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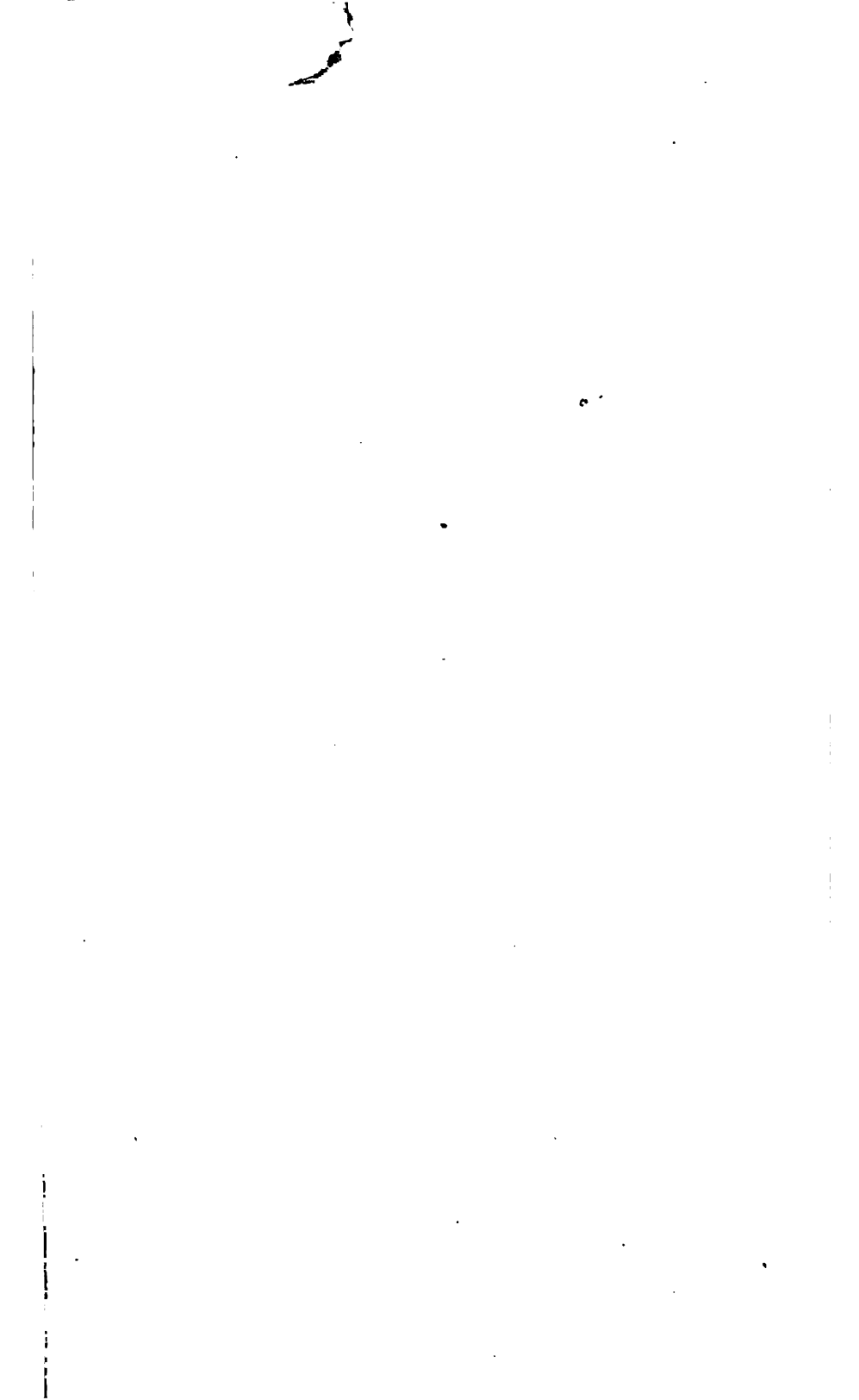




















203-3-

**REPORTS OF CASES**  
**DECIDED IN THE**  
**COURT OF APPEAL,**  
**DURING THE YEAR 1897.**

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**VOLUME XXIV.**

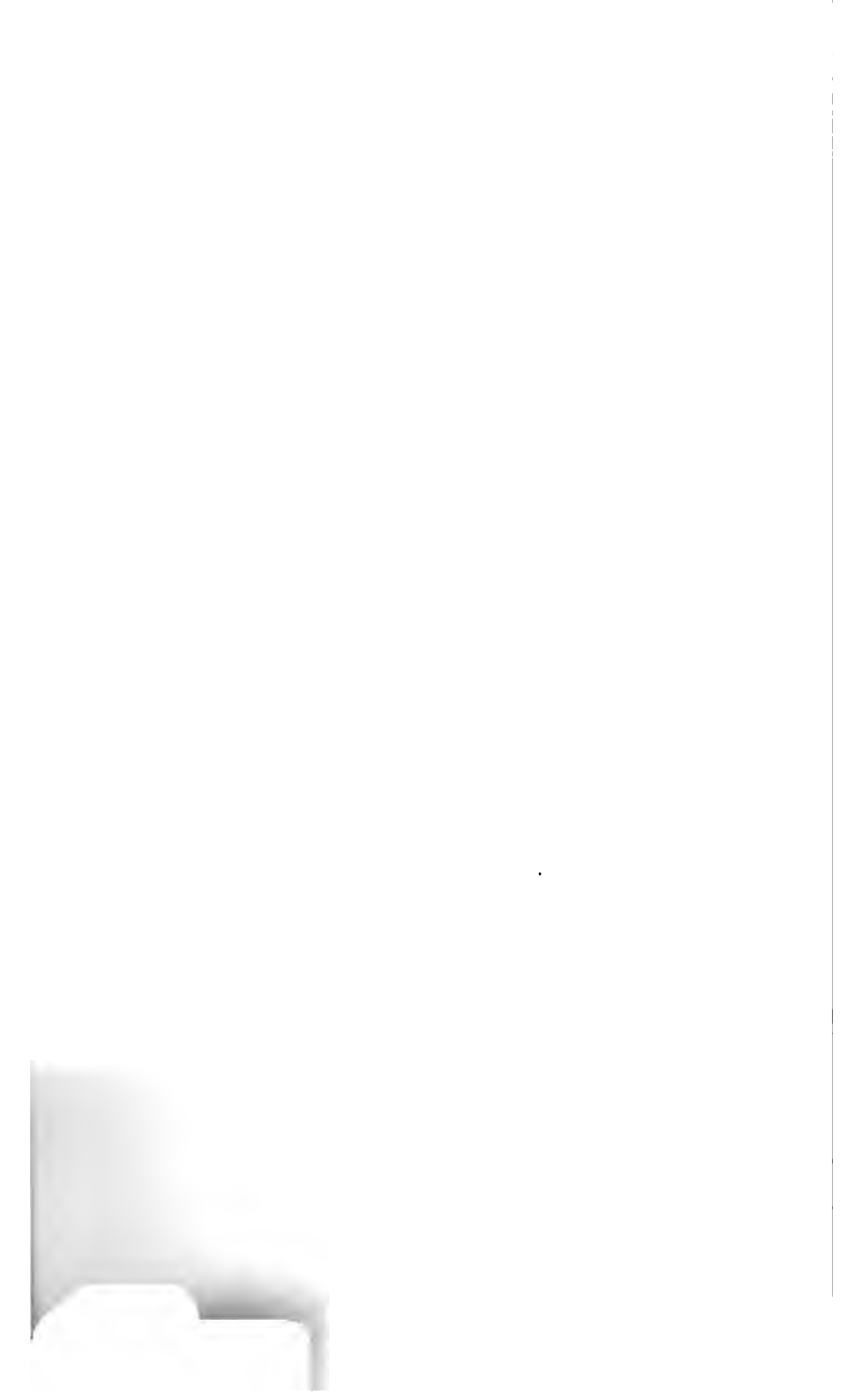
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**TORONTO:**  
**ROWSELL & HUTCHISON.**  

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**1898.**



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#### **MEMORANDA.**

On the 5th of April, 1897, the **HONOURABLE JOHN HAWKINS HAGARTY** resigned his office of Chief Justice of Ontario.

On the 24th of April, 1897, the **HONOURABLE GEORGE WILLIAM BURTON**, a Justice of Appeal, was appointed Chief Justice of Ontario.

On the same day **CHARLES MOSS**, Esquire, one of Her Majesty's Counsel, was appointed a Justice of Appeal.

On the 28th of September, 1897, the Queen was pleased to grant the dignity of a Knight of the United Kingdom of Great Britain and Ireland unto the **HONOURABLE JOHN HAWKINS HAGARTY**, late Chief Justice of Ontario.

#### ERRATA.

Page 315, 3rd line from the foot, and page 316, 1st line: for "part consideration" read "past consideration."

Page 389, head-note: for "*Keachie v. Toronto*, 22 A. R. 351," read "*Keachie v. Toronto*, 22 A. R. 371."

Page 408, 11th line from the foot: for "*Nickisson v. Cockill*, 3 DeG. J. & S. 62," read "*Nickisson v. Cockill*, 3 DeG. J. & S. 622."

# ONTARIO APPEAL REPORTS.

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MARTIN V. SAMPSON ET AL.

*Chattel Mortgage—Affidavit of Bona Fides—Money not Actually Advanced.*

The affidavit of *bona fides* attached to a chattel mortgage, duly executed and filed, stated that the mortgagor was justly and truly indebted to the mortgagee in a named sum. A loan was made in good faith upon the security of the chattel mortgage, but the money was not paid over for five days after the affidavit was made.

In an action by the assignee for the benefit of creditors of the mortgagor under a subsequent assignment, to set aside the mortgage :—

*Held*, reversing the judgment of MACMAHON, J., 27 O. R. 545, that the mortgage was valid.

THIS was an appeal by the defendant Sampson from Statement. the judgment of MACMAHON, J., reported 27 O. R. 545, in favour of the plaintiff in an action by the assignee of the defendant Angus, for the benefit of creditors, under R. S. O. ch. 124, to set aside a chattel mortgage made by the defendant Angus to the defendant Sampson, on the 1st May, 1895, to secure \$1,000 and interest. The chattel mortgage was set aside because of the untruth of the affidavit of *bona fides* made on the 2nd May, 1895, by the defendant Sampson, who swore that the defendant Angus was justly and truly indebted to him in the sum of \$1,000, whereas the money was not actually advanced by the one defendant to the other until 7th May, 1895. The assignment to the plaintiff was made on the 11th May, 1895. The facts are more fully stated in the former report and in the present judgment.

The appeal was argued before BOYD, C., and ROBERTSON and MEREDITH, JJ., sitting as a second division of the Court of Appeal, on the 24th September, 1896.

**Argument.** *Hamilton Cassels*, for the appellant. The mortgage complies with the Bills of Sale Act; the good faith of the transaction is not questioned, has been found by the trial Judge, and is shewn by the evidence; and the money was actually advanced upon the mortgage. Under these circumstances, the Court should find that the execution and registration of the mortgage and the advance of the money was one entire transaction, and the mortgage valid. The mortgage and affidavits having been duly registered, sec. 5 of the Bills of Sale Act, 57 Vict. ch. 37 (O.), does not affect the mortgage. In one sense the affidavit was untrue, but it ceased to be so when it was implemented by the advance. It was merely a case of delay in carrying out the transaction. If the reasoning on which the judgment below is based is correct, one hour's delay would have had the same effect. The plaintiff has no status to attack the mortgage, and is not assisted by 55 Vict. ch. 25, sec. 1 (O.), for the attack is not made on the ground of fraud. In *Clarkson v. McMaster*, 25 S. C. R. 96, the mortgage did not comply with the Bills of Sale Act, and, moreover, was attacked for fraud. Again, it is shewn that from the time the appellant agreed to make the advance, the money was set apart for the purposes of the loan. *Kerry v. James*, 21 A. R. 338, goes much further than necessary for the purposes of this case. To hold that the money should have been paid over before the affidavit of *bona fides* was made, would render impracticable the lending of money on chattel mortgage. The scope and intention of the Bills of Sale Act is to give persons dealing with the mortgagor notice that his property has been incumbered, and if that notice is given in accordance with the statute, creditors cannot be heard to complain because the whole transaction, if a *bona fide* one, is not carried through in a few minutes: *Darvill v. Terry*, 6 H. & N. 807; *Marthinson v. Patterson*, 19 A. R. 188. At all events, the technical untruth of the affidavit is not sufficient to invalidate the mortgage: *De Forrest v. Bunnell*, 15 U. C. R. 370.

*J. J. Scott*, for the plaintiff. The question of *bona fides*

was not raised by the pleadings, no evidence was given upon it by the plaintiff, and there should have been no finding upon it. In *Clarkson v. McMaster*, 25 S. C. R. 96, the mortgage was attacked for fraud, but the plaintiff failed on that branch, and his position became the same as the plaintiff's here. The statute requires an affidavit, and unless the statements in it are true, the affidavit is worthless. The defect in it cannot be cured by the subsequent advance. The material is then ready for a fresh affidavit, that is all. There was no binding agreement to advance the money. Specific performance of such an agreement will not, at any rate, be granted: *Ex p. Dann*, 17 Ch. D. 26. There was, on the evidence, no setting apart of the money. It was not impossible to pay the money before making the affidavit. It is constantly done. By 55 Vict. ch. 26, sec. 2, an assignee has the right to question the security. That right was recognized in *Clarkson v. McMaster*, 25 S. C. R. 96, and the appellant is in the same position as if he held an unregistered chattel mortgage. English cases have no bearing on the case in hand. The English Act does not require an affidavit of *bona fides*. The converse case of this is *Midland L. & S. Co. v. Cowieson*, 20 O. R. 583.

H. Brock, for defendant Angus.

Cassels, in reply.

November 7, 1896. BOYD, C.:—

The chattel mortgage is dated 1st May, 1895; the affidavit of execution by the mortgagor is sworn on the same day; the affidavit of debt and *bona fides* by the mortgagee is sworn on the 2nd May; and the affidavit of execution by the mortgagee is sworn on the same day. The mortgage is filed on 3rd May with the clerk of the County Court; and on the 7th May payment is made of the \$1,000 which is stated to be the consideration of the mortgage.

In the mortgage the consideration is stated to be "in

Argument.

Judgment. hand well and truly paid by the mortgagee at or before  
Born, C. the sealing and delivery of these presents." There is a covenant by the mortgagor to pay the said sum with interest at twelve per cent. on 1st August, 1895.

The affidavit of the mortgagee is that the mortgagor is justly and truly indebted in the sum in the mortgage mentioned, and is otherwise conformable to the statute.

There was at the most a lapse of six days between the signature by the mortgagee and his affidavit, and the payment; and at least four days dating from the registration of the instrument, which, in the absence of other evidence, would be the time of delivery.

The question is whether this untruth of the affidavit vitiates the security; and the Judge of first instance has found in the affirmative.

The giving of the mortgage and the paying of the money appear to be parts of an honest transaction; and if so, the security should not be lightly set aside. To interfere, there must be some plain violation of statute law, for the findings of the trial Judge exclude the element of fraud. Now the statute which it is alleged has been broken is the Chattel Mortgage Act, and the breach consists in this, that the affidavit is said to be false or untrue because the money was not paid at or before the execution of the instrument, but some days thereafter. The import of the affidavit is, no doubt, that there was an existing debt in respect of the \$1,000 mentioned as the consideration, and if the matter fell under the English statute, the result might be fatal, as that requires the true consideration to be stated: *Mayer v. Mindlevich*, 59 L. T. N. S. 400. But with us the truth or untruth of the affidavit is important only as bearing on the question of fraud or *mala fides*. The untruth of the affidavit, if it is formally in conformity with the statute, gives no ground for avoiding the instrument under the terms of the Ontario Act. It would require some express legislative provision to the effect that a false affidavit should *per se* vitiate the security. In that view it is not of moment to consider whether

the affidavit was carelessly or recklessly false, nor as to what extent it is untrue, unless there is that in the transaction which imports a fraud upon creditors.

Judgment.  
Bord, C.

The transaction itself is in accordance with the ordinary way of doing business in lending on land, where the security is perfected and registered before the actual advance of money is made. Probably no objection would have been thought of had the money in this case been paid at a later hour on the day, after the instrument had been registered. Yet that, ethically considered, would not better an affidavit, sworn before, containing the language found in this affidavit, which is also the language required by the statute. But the law would not in that case have regarded the fraction of a day—preferring to view the whole as the one act on the one day. The present security apart from the statute is unimpeachable, though the advance was not made till the 7th, four days after the registration, because the intention and conduct of the parties all point to the whole as one transaction. As said in the evidence, the money “was waiting to be paid over upon the completion of the documents.” That is a fair way of regarding the dealing—as a transaction of contemporaneous loan—the security to be with reference to the \$1,000 to be advanced, and the payment to be made with reference to the specific security; the whole being completed by payment within a reasonable time after registration of the security and before any change in the situation of either party.

The germ of what I have thus developed as to the untrue affidavit may be found in the judgment of Osler, J. A., in *Marthinson v. Patterson*, 19 A. R. 188, at p. 196. As to linking the details together so as to form only one transaction when but a short interval, such as a few days, elapses, see what is said in *Ex p. Johnson*, 26 Ch. D. at p. 344, and *Ex p. Allam*, 14 Q. B. D. 43. For the flexible construction which may be given to the words “at the execution” of a deed, see *Ex p. Rolph*, 19 Ch. D. 102. I would also invoke the method of construction which is com-



**Judgment.** mended by Bowen, L. J., in *Ex p. Johnson*, 26 Ch. D. at  
**Born, C.** p. 348: "You must take a broad and business view of the transaction, and not look at it with that minute accuracy which persons would use who were examining into it, after the event, in a Court of Justice. It is sufficient if the statement is substantially accurate \* \* if its true business effect is stated." And perhaps still more pertinent is the language of Brett, L. J., in *Credit Co. v. Pott*, 6 Q. B. D. at p. 299, that the parties cannot shew error in the language as to the money being paid, but a third party can shew the real facts, and though it may be that the facts are not stated with strict accuracy, yet it will suffice if they are accurately stated either as to their legal effect or as to their mercantile and business effect. That canon of decision may well be adapted to the present case so as to uphold an honest security.

The same view as here expressed has been taken in some American decisions, as to which I may note *Tompkins v. Crosby*, 19 Atl. R. 720, and *Doolittle v. Lyman*, 44 N. H. 608, 611, where Bartlett, J., substantially said that the untruth of the affidavit did not make the transaction non-conformable to the Chattel Mortgage Act unless the statute so declared.

I would therefore reverse the judgment and dismiss the action with costs below and here.

ROBERTSON, J. :—

I concur.

MEREDITH, J. :—

I retain the opinion expressed during the argument, which was substantially this :—

We are not called upon in this case to determine whether or not a false affidavit would vitiate the instrument under the Act. If we were, the question would be : Does the Act require a real transaction and a true affidavit, or would a pretended transaction supported by a false affidavit be

unimpeachable under it, if, in form, they complied Judgment. with all its requirements? Of course it would not need MEREDITH, J. the aid of the Act to get rid of such a transaction, but it does not necessarily follow that therefore the Act does not make it invalid.

That was the broad ground upon which the appeal was supported in the argument, namely, that having complied with all the formal requirements of the Act, there being nothing left undone which the Act literally requires, the transaction could not be avoided by virtue of the Act.

But upon a narrower ground the defendants should, in my judgment, succeed, namely, that the affidavit was true; that in the eyes of the law, as well as according to the intention of the parties, the mortgagee was at the time of the making of the affidavit of *bona fides* indebted to the mortgagee as therein sworn; and that is the only respect in which it is said to be untrue.

The mortgage had been duly signed, sealed, and delivered. The covenant to pay would be good at law if made without any consideration. It was made with the intention of creating a present legal indebtedness, so that the covenantee might make the affidavit in question. Though the mortgagor allowed the mortgagee to retain the money for a limited time, that did not alter its legal effect. It was to be and was a valid legal mortgage meanwhile, as well as after the money was handed over.

Equity in some cases is very careful of a mortgagor, requiring even that the mortgagee shall make oath to the amount actually advanced upon the security of the mortgage. But equity does not prevent any one giving a mortgage without any valuable consideration, if there is no other ground for interfering with the mortgagee's legal rights under it. Nor is there any equity which prevents the giving of a mortgage for a certain sum to-day in consideration of a certain sum to be paid or thing to be given or service to be performed on a future day: see *Winter v. Lord Anson*, 1 S. & S. 434; 3 Russ. 488.

It is not needful to consider what the rights of the par-

**Judgment.** ties would have been if the mortgage money had not been paid over on completion of the title, for here it was paid over as agreed. The transaction is admitted to have been in all respects an honest one, and the parties to it intended it to be a valid security, and to create an actual indebtedness, for the amount covenanted to be paid, from the time of its delivery by the mortgagor to the mortgagee.

E. B. B.

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BADAMS ET UX. V. CITY OF TORONTO.

*Municipal Corporations—Negligence—Defect in Sidewalk beyond Line of Highway.*

A city corporation is liable for injuries happening to a person while walking and resulting from the defective condition of a part of a sidewalk constructed by them, extending beyond the true line of the street over adjacent private property so as ostensibly to form a portion of the highway, such defect being caused through the owner of the property having placed on such part of the sidewalk a grating covering an area, and having allowed it, to the knowledge of the municipality, to fall into disrepair so close to the highway as to render travel unsafe.

**Statement.** THIS was an appeal by the defendants from the judgment directed to be entered for the plaintiffs for \$600 at the trial of this action before MACMAHON, J., and a jury, at Toronto, on the 12th May, 1896, and a motion by the defendants for an order setting aside the judgment and directing judgment to be entered for the defendants, notwithstanding the answers of the jury to the questions submitted to them, or for an order setting aside the answers of the jury to the questions submitted to them and directing a new trial.

The action was brought by William A. Badams and Eliza Badams, his wife, against the corporation of the city of Toronto, to recover damages for personal injuries received by the wife on account of the alleged want of repair of one of the public highways of the defendants.

On the 14th September, 1895, the plaintiff Eliza Badams

was walking along the sidewalk on the west side of Spadina avenue, and while she was upon a certain wooden grating placed in the sidewalk covering an area under it, in front of a shop window, the grating broke, allowing her foot to go down into the area below and causing her to fall, breaking her ankle and otherwise injuring and bruising her. Statement.

The plaintiffs charged that the defendants' negligence in constructing or allowing the construction of the area under the sidewalk and of the wooden grating covering the same, and in constructing or allowing the same to be constructed in an improper and defective manner, and in permitting the same to become and remain out of repair, was the cause of the plaintiff Eliza Badams sustaining the injuries complained of.

The defendants denied the allegations of the statement of claim.

The accident happened in front of the shop of one Little, and, according to the evidence adduced by the defendants, the sidewalk at this point was laid by the defendants two feet beyond the street line to accommodate Little and the owners of other shops in the same block, and the sidewalk was afterwards cut by Little and the grating in question put in to replace a part of the sidewalk laid on Little's property, and not on the highway.

The questions left to the jury and their answers were as follows:—

1. Was the grating at the time of the accident defective?

A. It was.

2. If the grating was not defective at the time of its construction, state, if you can, when it became defective; also state what was the defect and what caused it.

A. Decay and wear. (The foreman stated that the jury were not able to say when it became defective.)

3. Was the injury to Mrs. Badams caused by such defect?

Statement.

A. It was.

4. Was the grating on the street or was it on Little's property?

A. Ten agree that it was on the city, and two that it was on Little's property.

5. Did Little put in the grating without the consent or authority of the corporation?

A. Yes.

6. If such authority was not given to Little, did the corporation become aware that the grating had been put in? When did it become so aware?

A. Yes. About the time the sidewalk was repaired.

7. Could the corporation by the exercise of ordinary care and diligence have become aware of the defect in the grating?

A. Yes.

And they assessed the wife's damages at \$500 and those of the husband at \$100.

Upon these findings judgment was entered for the plaintiffs with costs, from which the defendants appealed.

Their appeal was argued before BOYD, C., and ROBERTSON and MEREDITH, JJ., sitting as a second division of the Court of Appeal, on the 24th September, 1896.

*Robinson, Q.C.*, and *W. C. Chisholm*, for the appellants. There is no evidence to sustain the finding of the jury that the grating was on the street. There was no evidence of notice to the defendants of any defect, and no evidence to sustain the answer to the 7th question. The grating was upon private property, and there was nothing to indicate to the defendants' officers that it was in a dangerous condition. If the grating was two feet off the street, what is the liability of the defendants? A case in the United States, *Jewhurst v. City of Syracuse*, 108 N. Y. 303, comes near this. Where an excavation is so near the highway that people may stray into it, it should be guarded. But this is not such a trap as could be fenced off. The ordinary law of negligence cannot be applied if the grating is not

on the highway. The defendants could not assume the duty of examining all the gratings in the city. The principle that the defendants should have known of the defect by due diligence does not apply. The case of *Danaher v. City of Brooklyn*, 119 N. Y. 241, is not like this in its facts, but the principle is the same. They also referred to *Fitzgerald v. City of Berlin*, 64 Wis. 203; *Stone v. Inhabitants of Attleborough*, 140 Mass. 328; *Stockwell v. Inhabitants of Fitchburg*, 110 Mass. 305; *Sullivan v. City of Boston*, 126 Mass. 540; *Boswell v. Township of Yarmouth*, 4 A. R. 353. Argument.

*W. R. Riddell* and *D. Urquhart*, for the plaintiffs. There is no doubt that the grating was defective, and the injury was caused by the defect. There is evidence in support of both the 4th and 7th findings, and the questions were proper ones for the jury. Even if the grating was not upon the street, the defendants, by building the sidewalk up to the line of the shops, adopted that as the street line: *Regina v. Village of Yorkville*, 22 C. P. 431; *Ivory v. Town of Deerpark*, 116 N. Y. 476. It was the duty of the defendants to keep the sidewalk free from defects, whether it extended on to private property or not: *Village of Mansfield v. Moore*, 124 Ill. 133. It was negligence of the defendants to permit the construction of the grating and to allow it to remain in their sidewalk. There was nothing to indicate to the public that the boundary of the street was two feet east of the end of the sidewalk, and this establishes the liability of the defendants: *Jewhurst v. City of Syracuse*, 108 N. Y. 303. The plans are inconsistent and inaccurate, and if they are rejected, the limit should be ascertained in accordance with public user: *State v. Van Derveer*, 47 N. J. L. R. 259. If the defendants did not wish to assume responsibility for the grating, they should have given notice to the public that it was on private property and that they would not be responsible for any defect in it, or should have put up a guard: *Cartright v. Town of Belmont*, 58 Wis. 370; *Smith v. City of Lowell*, 139 Mass. 336. It was the duty of the

**Argument.** defendants to inspect the grating from time to time; had they done so they would have discovered the defect: *Webb v. Rennie*, 4 F. & F. 608; *Mersey Docks Trustees v. Gibbs*, 11 H. L. C. 686; *Bidwell v. Town of Murray*, 40 Hun 190; *Murphy v. Phillips*, 35 L. T. N. S. 477; *Stebbins v. Township of Keene*, 55 Mich. 552; *Squires v. City of Chilli-cothe*, 89 Mo. 226; *Jansen v. City of Atchison*, 16 Kan. 358. They referred also to *Christie v. City of Portland*, 29 N. B. Reps. 311; *Christie v. City of St. John*, 30 N. B. Reps. 492, 21 S. C. R. 1; *Potter v. Town of Castleton*, 53 Vt. 435; *Macdonald v. Township of South Dorchester*, 29 C. P. 249; *Boswell v. Township of Yarmouth*, 4 A. R. 353; *Avery v. City of Syracuse*, 29 Hun 537; *Regina v. Township of McGillivray*, 38 U. C. R. 91; *Gallagher v. City of St. Paul*, 28 Fed. R. 305.

*Robinson*, in reply.

November 7, 1896. BOYD, C.:—

As to the general law applicable to this case, I am prepared to adopt as correct the statement of principle found in the judgment of Peckham, J., in *Jewhurst v. City of Syracuse*, 108 N. Y. at p. 312, to this effect: where there is no visible boundary to the line of street, and a portion of the roadway travelled on is so near the actual line (although really outside thereof) as to induce the belief in any one exercising reasonable care that he is within such line, if such portion is for any reason rendered dangerous for travel, and the city has notice thereof in due time, and such danger can be remedied by the exercise of reasonable care, either by the erection of a guard or in some other way, and this is neglected, then the municipal body is liable to one injured at the place of danger, who is himself free from neglect, contributing to the injury.

Here the jury have found that the place is within the proper limits of the street. As to that the great weight of evidence is the other way, going to shew that the true width of Spadina avenue is uniformly 132 feet. There is

no evidence of dedication : see what is said in *Belford v. Haynes*, 7 U. C. R. at p. 468. But given this width, it would place the grating in question entirely on the land of Johnston Little, although within two feet of the street as laid out originally. One would infer, but there is no direct evidence, and the jury have not so found, that prior to the erection of the Little stores the sidewalk ran along the proper line of the avenue ; that he built up to an old fence and projected his grating for the purpose of lighting the cellar some seventeen or eighteen inches in front of the fence, i.e., between the store and the then sidewalk ; and that afterwards the city so built the sidewalk as to come up flush with the store and the grating. Then this extended plank and the grating would form the surface over which the public would walk in going to and from the store and in the ordinary use of that part of the street. The whole appearance would be such as in the case of stores abutting on the highway with gratings for light and air let into the sidewalk and forming a *pro tanto* equivalent for it. Upon the whole of this walk the public were invited to travel—it was ostensibly the public way, and no notice was given in any manner that part of it was on private property, so that it was conventionally and actually the travelled way for pedestrians. The jury find that the grating was old and unsafe and had been so long enough to affect the city with notice of its dangerous condition. There is also evidence to shew that it was not properly constructed, having regard to the grain of the wood, and that the use of wooden gratings is prohibited by the city.

Judgment.

BOYD, C.

Now there are many authorities to shew that where holes or other defects exist in such close proximity to the highway proper as to make it unsafe to travel upon, and these, being known to the municipality having charge of the public ways, are allowed so to continue, then in contemplation of law it is as if the highway itself were out of repair, and the municipality is liable for damages resulting from the defects. It is for the jury to say whether the



Judgment.

BOYD, C.

danger is so close to the highway as to render travel unsafe and whether the municipality has had reasonable notice of the danger: *Warner v. Inhabitants of Holyoke*, 112 Mass. 362; *Purple v. Inhabitants of Greenfield*, 138 Mass. 1; and *Hadley v. Taylor*, L. R. 1 C. P. 53. Though it is true in this case that the city might not be able to enter upon the place to repair, yet if the danger is so close to the road as to be a nuisance it could be abated. Or the city might notify the owner to put in proper gratings, and, if he failed, could change the sidewalk so as to leave a division between the street and the store, if it is not feasible to put up railings around the grating. The case has not been put to the jury precisely as it might be upon the foregoing lines of liability, but in effect the finding is what would probably be repeated on the next trial, even though it were before a Judge according to the recent statute.

If the parties are content to have the finding set aside that the *locus in quo* is part of Spadina avenue and to let the present verdict stand on an amended record, well and good. But if this is objected to by the city, let there be a new trial generally—the costs of the present trial and appeal being paid by the city to the plaintiffs.

If there is a new trial, either party may be allowed to amend by adding the land-owner with appropriate allegations.

ROBERTSON, J.:—

I concur.

MEREDITH, J.:—

Further consideration of this case has not altered my opinion expressed on the argument of it. It seems to me a clear case.

The defendants constructed and maintained a plank sidewalk, and, after an accident has happened through their neglect to keep it in repair, seek to escape liability,

because, they say, the place of the accident was not Judgment. actually within the true limits of the public street. Surely MEREDITH, J. that is no defence; they took possession of and occupied and used the land covered by the whole width of the sidewalk as part of the public street, and invited the public to so use it, without any indication of the slightest kind that any part of the walk was, as to title or otherwise, any different from any other part of it. The planks ran the whole way across from the buildings to the horse road, except where cut into for the common purpose of putting in gratings to admit light and air to the cellars of the buildings against which the walk abutted.

Assume that the sidewalk is partly beyond the true limit of the highway, and upon what is really the land of the owners of the buildings, what difference can that make? Was it the duty of the plaintiff to have the true line defined; and at her peril, her own risk, overstep it? And what difference can it make whether such land was held by the defendants with or without the license of the owners? The defendants were in possession of it, treating it in all respects as if part of the public highway which by statute they were bound to keep in repair; a possession which would in time, if without the license of the owners, supersede the owners' right and give the public all the right in law which now in fact is exercised over it.

It cannot be that a corporation can escape liability by shewing merely that the injury happened at a point which, on actual survey, is found to be without the true lines of the highway as originally surveyed, though until then supposed to be and in all things treated as if within such true limits. And that is really this case; it is not the case of a highway upon which the corporation has done nothing or little by way of improvement; here they constructed a somewhat costly sidewalk, and in effect thereby said, this is part of the public highway which we are bound to keep in repair and which we set apart for the use of pedestrians: see *Boswell v. Township of Yarmouth*, 4 A. R. 353.

**Judgment.** The case may not have gone to the jury just as, in my opinion, it ought to have; but it is a case which now would be tried without a jury, and as counsel for all parties have requested that we should deal with it now upon the merits, and as it is a case which seems very plain to me, I would, upon the ground I have mentioned alone, direct that judgment be entered for the plaintiffs and damages, in the amounts assessed by the jury, with costs of the action, including the costs of this motion.

E. B. B.

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### HOPE V. MAY.

*Bankruptcy and Insolvency—Assignments and Preferences—Agreement to give Chattel Mortgage—Bills of Sale and Chattel Mortgages—Change in Statute Law—Registration of Agreement—59 Vict. ch. 34 (O.).*

An unregistered agreement by a debtor to give to his creditor upon default in payment, or upon demand, a chattel mortgage upon his "present and future goods and chattels" confers no title upon the creditor as against the debtor's assignee for the benefit of creditors, who takes possession before a chattel mortgage is given.

*Kerry v. James*, 21 A. R. 338, considered.

Judgment of ROSE, J., affirmed.

After judgment in the assignee's favour the Act 59 Vict. ch. 34 (O.) was passed, and the agreement in question was registered:—  
*Held*, that this did not validate it.

**Statement.** THIS was an appeal by the plaintiffs from the judgment of ROSE, J.

The plaintiffs were merchants carrying on business at the city of Hamilton, and the defendant was the assignee for the benefit of the creditors of one John Whitfield, who carried on business at the city of Toronto. The plaintiffs had for several years been dealing with Whitfield and had supplied him with goods and helped him financially. In January, 1895, he owed them more than \$2,000, and they insisted on obtaining payment or security. On the 7th of January, 1895, one of the plaintiffs and his solicitor saw Whitfield and obtained from him the following agreement:—

"TORONTO, January 7th, 1895.

Statement.

"Messrs. Adam Hope & Co.,

and their successors in business :

"For valuable consideration, the receipt whereof I hereby acknowledge, I John Whitfield hereby assign, transfer and set over to you all my present and future book debts, claims, bills of exchange, promissory notes, contracts, and choses in action, and also all my present and future books and papers containing entries of or relating to the same, as collateral security for the payment of my present and future indebtedness to you and your successors in business. And I hereby further agree that in case at any time I make default in the payment of any portion of my present or future indebtedness to you, or in case at any time you demand the same, I will give you a good and sufficient chattel mortgage on all my present and future goods and chattels whether situate on my present factory premises on Trenton street, East Toronto, or elsewhere, in security for my present and future indebtedness to you.

"Witness my hand and seal,

"(Signed) JOHN WHITFIELD. (Seal.)"

Whitfield was at this time, as afterwards appeared, insolvent. No advance either of money or goods was made by the plaintiffs to Whitfield at this time, but a month later they gave to him an accommodation note for \$324, to meet a payment, and at the maturity of this note they had to pay it. They also advanced to him from time to time over \$800 worth of goods. He made default in payment, and on the 12th of June, 1895, they demanded a chattel mortgage. This demand was not complied with, and on the 2nd of August, 1895, a similar demand was made. Whitfield, however, was at that time having difficulty with some of his other creditors, and said that he could not give a chattel mortgage until that difficulty was settled. On the 7th of August, 1895, he made an assignment for the benefit of his creditors to the defendant, pursuant to the Act respecting Assignments and Preferences by Insolvent Persons ; and at that time he had a stock of goods

**Statement.** which the assignee took possession of, and a considerable sum due to him by his customers. The plaintiffs demanded possession of his books of account and claimed a lien upon the goods, but the assignee, pursuant to the direction of the creditors, refused to allow the claim, and this action was brought asking for delivery of the books of account to the plaintiffs, payment of moneys collected by the assignee, and a declaration that the plaintiffs were entitled to a lien upon the goods to the extent of their claim.

The action was tried at Hamilton, on the 13th of November, 1895, before ROSE, J., who, on the 1st of February, 1896, gave judgment in favour of the plaintiffs as far as the book debts were concerned, but held that the claim for a lien could not be enforced as against the defendant representing the creditors. The learned Judge found that the agreement had been entered into by the plaintiffs in good faith, without any knowledge of the insolvent condition of Whitfield.

After the passing of the Act, 59 Vict. ch. 34 (O.), the plaintiffs registered the agreement in question.

The plaintiffs appealed, and the appeal was argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ.A., on the 22nd of September, 1896.

*J. J. Scott*, for the appellants. There is no reason why this agreement should not be enforced by the Court. The agreement could not be registered at the time, but as soon as default occurred the plaintiffs endeavoured to obtain a chattel mortgage for the purpose of having it registered; and it is clear that there was no concealment or intention to defraud creditors. The difficulty has been caused by Whitfield's wrongful refusal to give the chattel mortgage, which he was bound under the agreement to give, and the defendant, representing Whitfield, cannot take advantage of that wrongful refusal. The learned Judge has found that the agreement was entered into in good faith, and that being so, it should be enforced: *Kerry v. James*,

21 A. R. 338. This case does not come within the doctrine of *Ex parte Fisher*, L. R. 7 Ch. 636. There was in this case no voluntary delay in enforcing the security with a view to enabling the debtor to obtain credit. An agreement similar to the one in question was enforced in *Clarkson v. Sterling*, 15 A. R. 234. The registration of the agreement under 59 Vict. ch. 34 (O.), validates it even if it was before defective. Argument.

*John MacGregor*, and *R. G. Smyth*, for the respondent. There being no present advance by the plaintiffs at the time this agreement was entered into, and no binding agreement to make future advances, the lien claimed cannot be enforced. It is not sufficient that future advances should have been in the contemplation of the parties at the time of the execution of the agreement. There must be some clear, definite, enforceable agreement to make advances: *Ex parte Dann*, 17 Ch. D. 26; *Lindon v. Sharp*, 6 M. & G. 895. If the plaintiffs had been anxious in good faith to obtain security, they could have taken a chattel mortgage and have registered it. Not having done so, the inference is that they were desirous of avoiding injury to Whitfield's credit, and the case falls within the doctrine of *Ex parte Fisher*, L. R. 7 Ch. 636. No demand for a chattel mortgage was made by the plaintiffs until Whitfield was on the eve of assigning, and if such an agreement were upheld it would open the door to fraud. This is an attempt to evade the Chattel Mortgage Act, and to evade also the provision of the Assignments and Preferences Act as to the presumption against the validity of transactions entered into within sixty days before the making of an assignment. *Kerry v. James*, 21 A. R. 338, is distinguishable. In that case there was a *bond fide* agreement to give security before the note in question was made, and the proceeds of the note were received by the insolvent. That case, too, is inconsistent with *Clarkson v. McMaster*, 25 S. C. R. 96. In *Clarkson v. Sterling*, 15 A. R. 234, the money was advanced on the faith of a definite agreement to give the security attacked

**Argument.** and the security was obtained before the assignment was made. If the agreement in question has the effect contended for by the appellants, it is void as being in fact an assignment of all the insolvent's property: *Ex parte Bailey*, 3 D. M. & G., at p. 544; *Ex parte Foxley*, L. R. 3 Ch. 515. The Act of 1896, 59 Vict. ch. 34 (O.), cannot validate a transaction declared invalid by a judgment of the Court before the Act was passed.

*J. J. Scott*, in reply.

January 12th, 1897. HAGARTY, C. J. O. :—

The appellants rely chiefly on the decision of this Court in *Kerry v. James*, 21 A. R. 338.

I think this case is clearly distinguishable. There the plaintiffs had a chattel mortgage on James's goods to over \$900. A month after, on the 6th of November, 1893, James appealed to the plaintiffs to help him by endorsing a note to be given by him to a creditor for \$450. The plaintiffs did endorse for him as requested, he agreeing to give them a second chattel mortgage for that amount at once. James and his creditors said they had not time to wait till the mortgage was drawn, and it was to be sent up for execution, and to be executed at once. On the faith of this the note was endorsed. The mortgage was prepared and sent up from London to Leamington for execution, but instead of executing it James made a general assignment to the defendant about nine days after this contract had been made between the parties.

The action was brought to enforce the agreement and for a lien.

Rose, J., decided in favour of the plaintiffs, and gave judgment both for the \$900 mortgage, and for the lien claimed on the later contract. The assignee had full notice of it.

On appeal this Court upheld the plaintiffs' claim.

I see a very marked difference between that case and the present.

There was a complete transaction: "If you will endorse this note for me, I will give you therefor at once a chattel mortgage on my goods." It should have been executed at once, and the matter closed. It was not to depend on some further arrangement as to payment of accounts at named times, and not to be executed until required in the discretion of the plaintiffs. There would, in such a case, seem to be an equity as between the parties to specifically perform what was agreed.

The learned Judge in *Kerry v. James*, says that he had *Robins v. Clarke*, 45 U. C. R. 362, in which he was counsel, in his mind.

There the mortgage was given expressly as the consideration of supplying the mortgagors with a quantity of flour, and the Court considered that it was in no way a dealing by which a preference was given to one existing creditor over another, and that the defendants became creditors only as the result of the contract for security, which was not void as against the then existing insolvent laws.

There was a fatal objection to the affidavit to the mortgage, but the mortgagees had taken actual possession.

If, in the case before us, a mortgage had been given by Whitfield pursuant to the agreement before his assignment, the law as laid down in *Clarkson v. Sterling*, 15 A. R. 234, in this Court, would have been properly urged to refer it back to the time of the agreement.

But there it was all one direct bargain by deed. Sterling advanced a large sum to a mercantile firm in 1884 to be repaid at any time after January, 1886, on six months' notice. They consented if they made default on notice, to give to Sterling as security bills receivable and debts due them of sufficient value to secure him.

The notice expired July 15th. He then demanded payment. They put him off several times until December 19th, when they assigned the securities to him.

On February 11th they assigned to Clarkson, the plaintiff.

The Court held that Sterling's rights must be considered

Judgment.

HAGARTY,  
C.J.O.



Judgment.

HAGARTY,  
C.J.O.

as they stood on the 15th of July, at the expiration of the notice, and the transfer of securities on 15th December would be upheld as if so made in July as agreed.

I can see nothing in that case to uphold the plaintiffs' present claim. The authorities cited in Clarkson's case shew how such an assignment is to be regarded, at least under the Bankrupt Act.

It must be borne in mind that the agreement here relied on was simply to secure existing or future liabilities, not in consideration of a present advance, or fresh or actual value given therefor.

As Sir George Mellish says in *Ex parte Fisher*, L. R. 7 Ch., at p. 642: "We agree that the authorities establish, as a general rule, that where a sum of money is advanced upon the faith of a contract that a bill of sale shall be given, the sum so advanced is to be treated as advanced upon the credit of the bill of sale, and is not to be considered as a past debt." Again (at p. 645): "If we were to hold this bill of sale to be valid, we should practically abrogate the rule that the assignment of the whole of a debtor's effects in consideration of a past debt is an act of bankruptcy, and should in every case enable a favoured creditor, who can trust his debtor to give him a bill of sale of all his property when required, to obtain payment of his debt in full to the prejudice of the other creditors."

Both in this latter case and in *Ex parte Kilner*, 13 Ch. D. 245, the position of the parties and the effect to be given to the words "if required," are fully considered.

In *Ex parte Burton*, 13 Ch. D., at p. 108, James, L. J., says: "A Court of Equity regards that which has been agreed to be done, as done, and therefore it has been said that, if it was really part of the understanding when the money was advanced that a bill of sale should be given, then that agreement would be the same thing as if the bill of sale had been actually given. But *Ex parte Fisher* established this exception upon that exception to the rule, viz., that if the bargain be not an out and out one, but only an agreement to give the bill of sale when required, then it

is only a device to enable the debtor to acquire false credit, and the creditor is not entitled to avail himself of it in the event of the debtor's bankruptcy."

Judgment.  
HAGARTY,  
C.J.O.

We are not considering in the case for judgment what is technically an "act of bankruptcy," but the effect to be given to our own insolvency laws as to fraudulent preferences.

The earliest date at which the plaintiffs were entitled to the mortgage was the 12th of June. If given then, it would be within sixty days of the assignment of the 7th of August, and the presumption as to being made with intent, etc., and to be an unjust preference would appear to apply.

I think it would be very hard to uphold a chattel mortgage executed on the plaintiffs' requisition on the 12th of June, and that it would come within the last quoted section.

The agreement of the preceding January comes, in my judgment, within the cases cited herein. It was a wholly prospective arrangement, based wholly on the then state of Whitfield's debt to the plaintiffs, and without fresh consideration. It shews no contract on the plaintiffs' part to make advances, or to give time or sell fresh goods. But it places it in their power at any time they may think it advisable to interpose to insist on security on the debtor's stock in trade, and is designed to cover all future, as well as existing, liabilities, and future as well as existing goods, and was, in substance, a security to and preference of a creditor.

I think it cannot be supported against the general creditors under the assignment, and that my learned brother Rose's judgment was right.

We cannot place the plaintiffs' right higher than if they had got the chattel mortgage according to the terms of the January agreement, when they demanded it in June, when the debtor was insolvent and within the sixty days of his subsequent assignment, and there is nothing to rebut the statutable presumption of fraudulent preference.

**Judgment.**

**HAGARTY,**  
**C.J.O.**

I do not profess to understand the principle on which the Legislature passed the two statutes as to agreements.

The Act of 1894, 57 Vict. ch. 37 (O.), came into force on 1st of January, 1895, consolidating the enactments as to chattel mortgages, etc.

The Act of 1896, 59 Vict. ch. 34 (O.), declares that every covenant, promise, or agreement to execute or give a mortgage, etc., shall be deemed a mortgage within the meaning of the Act of 1894, and is to be registered as in case of mortgages under said Act.

This is declared to be as to covenants or agreements to be made after the passing of the same Act: sec. 1.

So far it would not apply to the agreement of the 7th of January, 1895.

Section 3 then declares that as to agreements made before this Act, the provisions of this Act as to registration may be deemed to be complied with, if registration is effected within three months from the passing of the Act.

This is said to have been done. The Act was passed on the 7th of April, 1896. I am unable to believe that this Act can govern or affect this case.

In the most liberal construction, I think it can hardly be held to govern a case tried in November, 1895, before the Act existed, and in which judgment had been formally given on the 1st of February, 1896, also before the Act.

Whatever rights the creditors' assignee had when the action was brought, and at the trial and judgment, could not, I think, be defeated by this provision. It could be applied to the then existing contracts, and the extra time allowed for registration, but not to actions pending or passed into judgment before either the passing of the statute or the subsequent registration.

The legal rights of the parties must rest on the facts in evidence as existing and proved in litigation before the passing of the Act. In the absence of express words, I cannot believe this Act at all affected the rights acquired prior to its passing. Time is expressly given for three

months after its passing to register agreements made before. This, surely, cannot refer to agreements which have passed into litigation and to rights acquired under or against them.

Judgment.

HAGARTY,  
C.J.O.

In Maxwell, 3rd ed., p. 298, it is said : " They (statutes), are construed as operating only on cases or facts which come into existence after the statutes were passed, unless a retrospective effect is clearly intended." Also at p. 308 : " When the law is altered pending an action, the rights of the parties are decided according to the law as it existed when the action was begun, unless the new statute shews a clear intention to vary such rights."

The cases are fully reviewed.

BURTON, J. A. :—

I think that *Clarkson v. McMaster*, 25 S. C. R. 96, governs this case, and that the agreement cannot be enforced as against the assignee.

OSLER, J. A. :—

The case of *Kerry v. James*, 21 A. R. 333, which the appellant relies upon, was decided—rightly or wrongly—on the well-known principle that the assignee for creditors not being an assignee in insolvency or anything but a voluntary assignee took no better title than his assignor, and subject to any liens or charges which the latter had created upon the property coming into his hands. But in the subsequent case of *Clarkson v. McMaster*, 25 S. C. R. 96; reversing *S. C.*, 22 A. R. 138, it seems to have been decided upon the 2nd section of 55 Vict. ch. 26 (O.), that the statutory assignee for the benefit of creditors " undoubtedly represents the creditors just as much as does, in England, an assignee in bankruptcy." I obeyed that decision in the recent case of *Meharg v. Lumbers*, 23 A. R. 51, and am bound to do so on this occasion, not being able to see in what way *Kerry v. James* can possibly consist with the construction we are, by *Clarkson v. McMaster*, compelled to place upon the section.

**Judgment.**

**OSLER,  
J.A.**

Then, considering that the Bills of Sale and Chattel Mortgage Act never could have been evaded as against a creditor or subsequent mortgagee or purchaser entitled to take advantage of its provisions, by a mere prior agreement unregistered to give a mortgage or bill of sale, I agree in affirming the judgment of my brother Rose at the trial on the ground on which he placed it, namely, that this Act is an answer to the plaintiff's contention.

It has never been held that I am aware of that as against creditors or subsequent purchasers or mortgagees a prior agreement by the debtor to give a mortgage was of any avail, or that such an agreement was or would be outside of the Act so as to make registration unnecessary.

It is hardly to be supposed that so simple a method of evading its requirements would have remained undiscovered until the present day. We must now treat the assignee as being on the same footing in this respect as the creditor or subsequent purchaser, and consequently the agreement on which the plaintiffs rely is void as against him, or, as it would perhaps be more accurate to say, confers no title upon the plaintiffs as against the better title which has been acquired by the defendant by virtue of the assignment.

As to the Act 59 Vict. ch. 34 (O.), respecting antecedent unregistered agreements for bills of sale, etc., I think its intention simply was to permit such an agreement to be now taken and registered, with the same effect when registered in the prescribed manner as if it were a duly registered bill of sale or chattel mortgage. I do not think it was intended to validate or set up such an agreement as against any one who had acquired, as in the present case, a valid title to the property before the Act came into operation. It is singular that an assignee for the benefit of creditors should not have been expressly mentioned in the Act as one of the parties against whom the unregistered agreement shall be void, but if the assignee represents creditors, who are expressly mentioned

along with subsequent purchasers and mortgagees, the omission is probably of no importance.

Judgment.

OSLER,  
J.A.

I do not rest my judgment at all upon the Assignments and Preferences Act. I think the agreement in question is one which, apart from the Bills of Sale and Chattel Mortgage Act, would have been valid and not open to the objection that it was given with intent to prefer a creditor, or with intent to hinder, defeat, or prefer the other creditors of the debtor. It was procured by the exercise of very strong pressure on the part of the creditors as the only security the debtor would give them at a time when the latter was not, to their knowledge, in insolvent circumstances, and there is no evidence to warrant us in holding that there was any understanding that the giving of the mortgage was to be postponed, or that the demand for its execution was in fact postponed in order to protect the credit of the debtor. That was the case of *Ex parte Fisher*, L. R. 7 Ch. 636, and it is on that principle that bills of sale have been held invalid in subsequent similar cases. Here we have an express finding by the learned trial Judge, which I consider well supported by the evidence, that the agreement was taken in good faith. Then the further facts relied upon as tending to shew an intention to prefer, or to defeat, delay and hinder creditors, namely, that no fresh advance was made or stipulated for, and that the contemplated security was to cover the whole of the debtor's property, have by themselves no significance. Except under circumstances which, by force of our own statute, invalidate such a transaction, I know of nothing which forbids a man to take a security for a past indebtedness, and if it be reasonably necessary to do so, upon the whole of the debtor's property. We have already held in this Court that the latter is not of itself merely, evidence of an intent to prefer. The doctrine that a deed which covers substantially the whole of a man's property in consideration of a bygone debt, is an act of bankruptcy, without fraud in fact, is the creation of judicial decision under the administration of the Imperial Bankrupt Laws: *Lomax v. Bux-*

**Judgment.** *ton*, L. R. 6 C. P. 107, and finds as such no place in determining the question of the validity of an instrument under our Act.

**OSLER,  
J.A.**

Cases like *Ex parte Fisher*, L. R. 7 Ch. 636, and *Ex parte Dann*, 17 Ch. D. 26, which latter is commented upon explained and qualified by the subsequent case of *Ex parte Wilkinson*, 22 Ch. D. 788, are therefore not in point so far as they turn upon the application of this doctrine to defeat the instruments there in question, whether executed in pursuance of an antecedent agreement or otherwise. Had the mortgage been given by the debtor in this case when demanded pursuant to the agreement, on the 12th of June, and duly registered prior to the assignment, I think it must have been upheld against the assignee, and the existence of the agreement would have sufficiently rebutted the statutory presumption against its validity arising from its having been given within sixty days before the assignment.

But for the reasons I have given the appeal must be dismissed.

MACLENNAN, J. A. :—

I am of opinion that if this case rested on the law as it stood at the time of the trial, it could not be contended that the judgment was not clearly right. I agree with the learned Judge that to hold otherwise would render the Bills of Sale and Chattel Mortgage Act wholly nugatory. The principle of law on which an agreement to give a mortgage on specific goods is held to constitute a charge upon the goods themselves is that in equity what is agreed to be done shall be regarded between the parties as if it had been done. Under such an agreement as this the legal property in the goods does not pass, and the only right which arises from the breach of it, apart from the right to damages, is merely a right to the aid of a Court of Equity to compel specific performance of what has been agreed to be done. When, therefore, a statute declares that the act agreed to be done, when done as it ought to be, must be

done with certain formalities, the party can have no equity to dispense with the formalities so prescribed. In that respect equity follows the law. The formalities are enjoined by the law for the protection of others than the parties to the contract; that is, of creditors, assignees for their benefit, and subsequent mortgagees and purchasers. The appropriate equitable relief upon this contract would be to compel the debtor to execute a mortgage of the goods. If the Court did that and no more, and it is only when, and because, the debt is due, that it does more, the mortgage would still have to be filed in the prescribed manner; and if that should for any reason be omitted, it would be strange if it could be held to be good against creditors. The reason of the omission can make no difference, whether it was inadvertence, or mistake, or fraud. The statute has made no exception. If not registered within the prescribed time, and with the prescribed formalities, it is void against creditors, etc. The agreement in question is to give a mortgage. When that is done, whether voluntarily or by the compulsion of the Court, it must be like any other mortgage, and if not registered, the legal consequences must follow; and the fact that it is in pursuance of an antecedent agreement can make no difference. It therefore follows clearly, in my opinion, that no mortgage having been given in this case until the title of the assignee had arisen, the plaintiffs are in the same position as between them and the assignee as if they had got a mortgage but it had not been registered.

Judgment.  
MACLENNAN,  
J.A.

Mr. Scott, however, invoked the benefit of the late Act, 59 Vict. ch. 34 (O.), which was passed on the 7th of April, 1896, after the judgment now in appeal was given; and he told us that in pursuance of the third section of that Act the plaintiffs had caused the agreement to be registered, within three months after the passing of the Act. He contended that by virtue of the Act such registration related back, and made the agreement valid as against the defendant, the assignee for creditors. The Act does not in terms validate anything, and it is remarkable that the



Judgment. assignee for creditors is not mentioned in it, and it may be  
**MACLENNAN,** that considerable difficulty may be found in its exposition.  
**J.A.** .With reference to the present case, however, it is sufficient to say, that at the time this Act became law the assignee had a good title to the goods in question, both legal and equitable, subject of course to the trusts of the assignment; and, therefore, to construe it as applicable to this case would be to take away vested rights, and it must be presumed not to have been so intended: *Maxwell on Statutes*, 3rd ed., p. 298, *et seq.*

I am, therefore, of opinion that the judgment should be affirmed.

*Appeal dismissed.*

R. S. C.

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## MCDONALD V. DICKENSON.

*Negligence—Nuisance—Highway—Drain Tiles—Master and Servant—Contractor—Respondeat Superior.*

A township council appointed by resolution two of the defendants, who were members of the council, a committee to rebuild a culvert under a highway within the municipality. These two defendants employed another defendant as overseer of the work and two other defendants to draw drain tiles, which were required for the work, to the place in question. The work was done by the day and while it was being done the tiles in question, which were of a large size and of a light gray colour, were piled on the highway near the culvert. The plaintiffs' horse shied when passing the tiles and upset the vehicle, and the plaintiffs were injured :—

*Held, per BURTON, J. A., OSLER, J. A., dissenting, that the act in which the defendants were engaged being in itself lawful they could be regarded only as servants of the council, and that the maxim respondeat superior applied :—*

*Held, per MACLENNAN, J. A., OSLER, J. A., dissenting, that leaving the tiles at the side of the highway was not negligence and did not constitute a nuisance, and that no action lay.*

In the result the judgment of BOYD, C., was reversed, OSLER, J. A., dissenting.

THIS was an appeal by the defendants Dickenson and Luton from the judgment of BOYD, C. Statement.

The action was brought to recover damages for injuries sustained by the plaintiff under the following circumstances :—On the 18th of June, 1892, she was driving along the Talbot road, in the township of Yarmouth, and when about four miles west of Aylmer, about six o'clock in the morning, her horse took fright at some tiles piled by the defendants on the side of the road, and ran away, upsetting the vehicle and throwing her out and seriously injuring her. At the place in question there was a fill of about fourteen feet, and a railing ran along each side of the fill. In this fill there was a culvert which needed repairing, and in April, 1892, the council of the township of Yarmouth passed a resolution appointing the defendant Brower, who was reeve of the township, and the defendant Luton, who was a member of the council, a committee to rebuild the culvert, and they were paid for their services. The defendant Luton bought the tiles required and had them shipped to New Sarum, and employed the defendants the

**Statement.** Tisdales to draw the tiles to the culvert. The defendant Dickenson was employed by the day in doing the work, and he was also pathmaster for the district in which the culvert was situated. A number of the tiles, which were two and a half feet long and forty inches in diameter outside and thirty-one inches in diameter inside and of a light gray colour, were piled on the north side of the fill at the end of the railing, and the plaintiff's horse shied when passing them and upset the vehicle. The defendants contended among other defences that they were fulfilling a public duty and that they were entitled to notice of action, and when the action first came on for trial it was dismissed on that ground.

On appeal to the Queen's Bench Division, however, this judgment was reversed and a new trial was ordered: see 25 O. R. 45, and the judgment of the Divisional Court was affirmed by this Court: 21 A. R. 485.

The action then came on for trial on the 10th of February, 1896, at St. Thomas, before BOYD, C., and with it was tried a similar action of *Freeman v. Dickenson*, the plaintiff in that action having been in the vehicle with the plaintiff McDonald.

The following were the questions submitted to the jury and their answers thereto:—

Did the plaintiff manage the horse she drove properly? Yes.

Was it want of care to put the tiles at the end of the rail? We consider it want of care to leave the tiles unprotected.

Who put the tiles where they were at the place of the accident? We consider Dickenson and Luton responsible.

If there was want of care, what damages do you give to the plaintiff Mrs. McDonald, and to the plaintiff Mrs. Freeman? We agree to give Mrs. McDonald \$400 and Mrs. Freeman \$50.

Was the work of repairing and placing the tiles being done by the defendants for the corporation of Yarmouth

in order to put the highway in a good state of repair? **Statement.**  
Yes.

On these answers judgment was entered in favour of the respective plaintiffs against the defendants Dickenson and Luton for the damages assessed, and the actions were dismissed as against Brower and the Tisdales.

The defendants Dickenson and Luton appealed, and the appeal was argued before BURTON, OSLER, and MACLENNAN, JJ. A., on the 25th of September, 1896.

*J. A. McLean*, and *W. K. Cameron*, for the appellants. It was the duty of the township to keep the highway in repair, and the defendants were acting as their officers and employees and are not liable. The right of action, if any, is against the township, and this is simply an attempt to make the servants of the township liable, the time having elapsed within which an action could have been brought against the township. But on the merits there is no liability. The placing of the tiles in question upon the highway was a lawful and necessary act, and the ground of negligence relied on, namely, "leaving the tiles unprotected" is not one that is sufficient to support the judgment.

*J. A. Robinson*, for the respondents. It has already been held that the defendants were not performing a public duty, and they are personally liable for the negligent manner in which they carried on this work: *Harrison v. Brega*, 20 U. C. R. 324; *Harrold v. Simcoe*, 16 C. P. 43; *Allen v. Hayward*, 7 Q. B. 960; *Pearson v. Cox*, 2 C. P. D. 369; *Steel v. South Eastern R. W. Co.*, 16 C. B. 550. The tiles were very large and of peculiar appearance, and the defendants must have known that a horse would very likely be frightened by them. They should, therefore, have covered the tiles over or have given persons using the highway warning of the possible danger: *Heaven v. Pender*, 11 Q. B. D. 503; *Roe v. Lucknow*, 21 A. R. 1; *Howarth v. McGugan*, 23 O. R. 396; *Wilkins v. Day*, 12 Q. B. D. 110.

*W. K. Cameron*, in reply.

Judgment. January 12th, 1897. BURTON, J. A.:—

BURTON,  
J. A.

This action is novel in its character, and seems to have been adopted from a mistaken idea on the part of the plaintiffs' advisers that the time for bringing an action against the municipal corporation of the township had lapsed.

The work on which the defendants were engaged was not only lawful but was obligatory upon the corporation, and the allegations that the obstructions and excavations were placed and made upon the highway unlawfully was disproved. Where could they find a more suitable spot for placing the material they were using in the work on which they were engaged (which are the alleged obstructions) than on the untravelled portion of the highway? Presumably they would have been trespassers if they had placed them on the land adjoining the highway, and it is clear that it was a proper user of that portion of the highway.

The plaintiffs were driven finally to contend that the defendants were contractors to do the work, but there is no evidence to support that contention; the corporation were doing the work, and all of the parties sued, with the exception of the Tisdals, were their servants or agents. The two members of the council for the purpose of this suit occupied a similar position, although their positions more resembled that of a foreman or superintendent.

If this be the true position of the parties, it is clear to my mind that the defendants cannot be made liable in this action. The maxim of *respondeat superior* applies, although it is, perhaps, not very creditable to our system of jurisprudence that it has taken two trials, one motion to the Divisional Court, and two to this Court before reaching this result.

No doubt in the case of a wrongful tortious act all persons concerned in the wrong are liable as principals. Here, however, the act in which the defendants were engaged was in itself legitimate, and for any act of neglect or omis-

sion they would not be liable to the party suffering the injury, for in such case they could be regarded only as servants, and then their neglect is chargeable only to their principal. Here the only neglect found by the jury was an omission to protect the goods by a tarpaulin or covering of some kind. That is the only neglect alleged or referred to in the evidence or in the Judge's charge, and if there is any liability on the part of the defendants it would be to their employers only.

Judgment.

BURTON,  
J.A.

The learned Chancellor on the last trial appeared to consider himself bound by what he considered the ruling of the Divisional Court, but I think, with great deference, that the learned Judge has misapprehended the effect of that ruling.

I am not aware, and it does not anywhere appear, whether on the first trial evidence was given to shew, and the point taken, that there could be no liability on their part as such servants or whether the point was simply taken that the defendants were entitled to notice of action. In the case as reported that appears to have been the only point in issue, and the same in this Court; if all the facts were before the Court on the first trial, it is to be regretted that this objection, which would have made a final disposal of the whole matter, was not taken.

As I read the decision, it dealt with the question of notice of action only, and in no way touched the general question, which was still open at the last trial on the motion for a non-suit, which the learned Judge might have granted if he had thought the question open.

That is the conclusion to which I think we must now come.

The cases cited in the reasons against the appeal as to the reasonable user of the highway do not affect this case.

*Howarth v. McGugan* 23 O. R. 396, was a case, not of a servant or agent, but of an independent contractor, for whose acts the corporation was not liable.

The Court in that case remarks that the fact that the obstruction took up a certain portion of the roadway, and

**Judgment.** thus narrowed the track is nothing in the case, because  
**BURTON,** the travelled highway was not narrowed; and even if it  
**J.A.** had been narrowed, the injury did not occur from coming  
in contact with the obstruction.

But the jury having found upon a charge that was not objected to that leaving a large iron hammer, whereby horses were frightened, for a long time on the road was negligence, the Court refused to interfere.

In *Wilkins v. Day*, 12 Q. B. D. 110, a large agricultural roller was left for several hours on the side of the road projecting some six or seven inches over the travelled portion of the road, and frightened a horse, whereby a pony carriage which the plaintiff's wife was driving was overturned and she was killed, and the jury found it was an unreasonable user of the highway.

It will be seen that the only negligence found by the jury is that the tiles were left unprotected (that is uncovered with a tarpaulin or similar covering); and as to this there was some evidence that that would have a tendency to increase the danger, and it may be doubtful whether if the action had been against the corporation that would constitute a cause of action against them.

I am of opinion that the appeal should be allowed and this action and the other dismissed with costs.

**MACLENNAN, J. A.:—**

It appeared that at the point where the accident occurred the road had been out of repair by the caving in of a culvert for the passage across the highway of a stream of water. The culvert was in a valley between two hills, and the grade of the road had been raised at that point a good many feet, and the embankment was guarded on both sides by a railing. The township of Yarmouth, on which the statutory duty of repairing the road lay, had passed a resolution for the renewal of the culvert, and the work was being done by the appellants by the authority and instructions of the township—not as contractors, but

as the agents and servants of the township, and at its expense. The plan adopted was to renew the culvert with very large hollow tiles, about three feet in diameter, and weighing about 860 pounds apiece. The tiles had been brought to the place on Friday, the day before the accident, by teamsters, named Tisdale, employed for that purpose; had been unloaded and placed upon the north side of the road quite free from the travelled part, and leaving ample space for the public use of the road. The action was brought not only against the appellants, who were engaged in doing the work, but also against the Tisdales, and the case alleged against all the defendants in the statement of claim is that "owing to obstructions placed, and excavations made in the road unlawfully by the defendants, the plaintiff's horse became frightened and ran away," etc., and it was contended at the trial that all the parties who had any hand in placing the tiles where they were on the Saturday were liable to the plaintiffs for the accident. There was the evidence of the plaintiffs that their horse, which was usually quiet, had shied at the tiles, and there was some other evidence that the tiles were likely to cause a horse to do so, and it was suggested that they might have been covered. The tiles, however, were of a light gray colour, and there was no suggestion why they should frighten a horse more than any other physical objects lying where they were, nor why a covering of any kind would have prevented them from startling a horse or have made them less likely to do so. I think anything of that kind is mere guess work—mere speculation. When it is admitted, as it is, that the tiles were proper to be used for the repair of the road, it follows that it was lawful to put them where they were, ready to be placed in position when the moment for doing so arrived, and that they were lawfully there when the accident occurred. There can not be the slightest doubt, in my opinion, that it was lawful for the Tisdales to carry the tiles upon their waggon along the highway, just as they were, without covering or protection of any kind, and that if the plaintiff's horse had

Judgment.  
MACLENNAN,  
J.A.



**Judgment.** met them upon the road, or had been passing at the moment when they were being unloaded, and had been frightened, neither the Tisdales nor any one else would have been liable. I know of no case in which it has been held that a person travelling upon the highway with a load of merchandise of any kind is responsible because a horse may have shied at the appearance of his load. A city horse might shy at a load of hay, or of empty flour barrels, or puncheons—things much more portentous in appearance than two or three of these tiles, or all together—and yet, I imagine, no one would suppose the teamster would be liable.

**MACLENNAN,**  
**J. A.**

In this country, machines of various kinds are now used in farming operations, such as fanning mills, mowing and reaping and threshing machines, also steam engines and horse-powers, and these things have to be carried upon the highways, and may lawfully be so carried, and I suppose no one would say that because horses might be startled by their appearance they could not be lawfully carried without some kind of clothing or covering. In the same way, I think, it was lawful to carry these tiles along the highway.

If that is so, and if there was no duty upon the defendants to cover or protect them while they were being teamed along the road to the place where they were wanted, I do not see that there was any duty to cover or protect them after they were unloaded and placed where they were when the accident occurred. They were placed where they were lawfully in performance of a public duty. They were inert physical objects, without anything unusual about them in form or colour, and no more likely to startle horses than many other objects of a similar size and form which are to be seen on roads and streets every day. In my judgment it might just as reasonably be held that a man might not wear a red coat on the highway lest he should frighten horses. *Roe v. Lucknow*, 21 A. R. 1, was a case of a horse being frightened, in which the defendants were held not liable because the act com-

plained of was lawful. If these defendants were bound to cover over the tiles lying on the roadside, they would equally have been bound to do so if they had been placed on the adjacent land, an obligation negatived by the case just referred to. I also refer to a very instructive case of *Rounds v. Stratford*, 26 C. P. 11.

Judgment.  
MACLENNAN,  
J.A.

In my opinion there was no evidence of negligence whatever which ought to have been submitted to the jury; and I think, having regard to the undisputed facts of the case, the actions ought to have been dismissed.

The appeals should therefore, in my opinion, be allowed.

OSLER, J. A. :—

The statement of claim alleged that while the plaintiff was driving along the Talbot road, in the township of Yarmouth, her horse was frightened by obstructions placed and excavations made in said road unlawfully by the defendants, in consequence of which the horse ran away, and the vehicle in which plaintiff was driving was upset, and the plaintiff was thrown and injured, etc.

At the trial it appeared that the council of the township of Yarmouth had determined to place a culvert or drain under the road near the point where the accident in question occurred, which at this place ran over a filling between two hills, the roadway being protected by a board fence or railing on each side. By a resolution of the council, passed on the 4th of April, 1892, the defendants Brower and Luton, who were respectively reeve and deputy reeve of the township, were appointed "a committee to rebuild the culvert on Talbot street." Their duty was, as Luton expressed it, to look after the work and have it done, and they employed the defendant Dickenson as overseer to keep the men's time and see that the work was not slighted in their absence. No other contract was let for the job; it was done by day work. They employed the defendants the Tisdales to draw the tiles, and the only connection they had with the work was as members of the committee

Judgment.

OSLER,  
J. A.

acting for the township. They were paid \$2.00 per diem for their services. Other payments for the work were made by the council on orders signed by them.

The tiles which caused the obstruction complained of and frightened the plaintiff's horse were very large (three feet in diameter, and two and one-half or three feet long), and they were placed on the road at the north end of the railing or fencing above spoken of, close to the travelled part of the road. This was said to be the most convenient place, or a convenient place, to deposit them for the purpose of getting at them when the men were ready to place them in position in the culvert. The Tisdales were told by the Dickensons to unload them there, and both he and the defendant Luton helped them to do so. There was much evidence that, placed where they were, the tiles were from their size and appearance calculated to frighten horses; that they had in fact done so in several instances, and that the defendant Dickenson had led horses past them which had taken fright at them. They were not guarded or covered in any way, and the plaintiff's horse, while she was driving it along the road and just as she was passing the railed part, shied at them, ran away, upset the buggy and threw out the plaintiff and her companion, causing the injuries for which the action was brought.

The defence substantially was that the defendants were acting merely as servants of the corporation and that the action should have been brought against the corporation, and that when this action was commenced the plaintiff was too late to sue the corporation, more than three months having elapsed after the damage had been sustained.

The learned Chancellor, after drawing the attention of the jury to the various parts of the evidence as it affected the several defendants, substantially told them that they should find whether there was any want of care on the part of these defendants, who might be found by them to be the persons who directed the tiles to be placed where

they were, in leaving them there unprotected or unguarded. It was on the whole favourable to all the defendants. There was no objection directly taken to the charge, but at the close of the case their counsel objected that as servants of the corporation the defendants were not liable. Questions were put to the jury who answered them, so far as they need now be referred to, by saying that they considered it want of care to leave the tiles at the end of the rail unprotected; that they considered the defendants Dickenson and Luton responsible, and that the work of repairing and placing the tiles was done by the defendants for the corporation in order to put the highway in a good state of repair.

Judgment.

OSLER,  
J.A.

Judgment was accordingly entered for the plaintiff against the defendants Dickenson and Luton and in favour of the other defendants.

I am of opinion that this judgment ought to be affirmed.

Both defendants are proved to have taken part in placing in the highway what turned out to be, as they were warned would probably be the case, a nuisance, as being likely to frighten horses. The defendants discovered almost immediately that it had that effect, causing horses passing on the highway to shy as they approached it. In this respect the case is directly within the authority of *Roe v. Lucknow*, 21 A. R. 1, the evidence having been given, for the rejection of which the nonsuit was set aside by the Court of Appeal in *Brown v. Eastern and Midlands R. W. Co.*, 22 Q. B. D. 391. *Rounds v. Stratford*, 26 C. P. 11, can hardly be said to have any bearing on the case, because the waggon, which was there alleged to have been an obstruction of and a nuisance on the highway, had not been placed there by the municipality. No positive notice to the municipality of the existence of the obstruction was proved, nor that a reasonable time had elapsed for them to have acquired notice and caused or required its removal, even if a waggon standing by the roadside could reasonably be regarded as a nuisance calculated to frighten horses.

Judgment.

OSLER,  
J.A.

I think the proper conclusion from the evidence is that the defendants Luton and Dickenson were both servants of the corporation, but I am with all deference wholly unable to understand how the maxim *respondet superior* has any application to the case. Their act was clearly a misfeasance. "Some confusion has crept into certain cases from a failure to observe clearly the distinction between nonfeasance and misfeasance. Misfeasance may involve also to some extent the idea of not doing, as where the agent while engaged in the performance of his undertaking does not do something which it was his duty to do under the circumstances; does not take that precaution; does not exercise that care which a due regard for the rights of others requires. All this is not doing, but it is not the not doing of that which is imposed upon the agent merely by virtue of his relation, but of that which is imposed upon him by law as an individual in common with all other members of society. It is the same not doing which constitutes actionable negligence in any relation:" Mechem on Agency, sec. 572.

And in *Osborne v. Morgan*, 130 Mass. 102, Chief Justice Gray remarks: "It is often said in the books, that an agent is responsible to third persons for misfeasance only, and not for nonfeasance. \* \* But if the agent once actually undertakes and enters upon the execution of a particular work, it is his duty to use reasonable care in the manner of executing it, so as not to cause any injury to third persons which may be the natural consequence of his acts; and he cannot, by abandoning its execution midway and leaving things in a dangerous condition, exempt himself from liability to any person who suffers injury by reason of his having so left them without proper safeguards. This is not nonfeasance, or doing nothing; but it is misfeasance, doing improperly."

See also *Shearman and Redfield on Negligence*, 4th ed., sec. 244; *Thompson on Negligence*, vol. 2, pp. 1057-1060; *Wilson v. Peto*, 6 Moore 47; *Nicholson v. Mounsey*, 15 East 384; *Pendlebury v. Greenhalgh*, 1 Q. B. D. 36; *Newton v.*

*Ellis*, 5 E. & B. 115; *Bliss v. Schaub*, 48 Barb. 339; *Gilchrist v. Carden*, 26 C. P. 1, *per* Gwynne, J.

Judgment.

OSLER,  
J. A.

What the defendants have here committed is a direct breach of that duty to take care which they owed to everybody who was likely to be affected by what they were doing, viz., the placing in the road of objects which, unless sufficiently protected or guarded, were likely to frighten horses. It was not a mere nonfeasance, the non-performance of some duty which they owed to their employers, the omission to do which resulted in injury to a third person. The obligation which they neglected was one which rested upon them in their individual character, quite apart from their position as servants of the corporation, though it might also involve the corporation in liability, because what they did, though done in an improper manner, was done by them in the course of their employment.

In such a case I cannot see how the defendants are in a position to avail themselves of a special defence such as the Statute of Limitations, which may have been given to the corporation employing them. As to whether the corporation would have been entitled to plead the statute under the circumstances I express no opinion.

*Appeal allowed, OSLER, J. A., dissenting.*

R. S. C.

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## GORDON V. WARREN.

*Husband and Wife—Separate Property—Covenant—Mortgage—Estoppel.*

Personal estate settled upon a married woman for her separate use for life without power of anticipation, and after her death to such uses as she might by deed or will appoint, and in default of appointment then over, no income therefrom having accrued due at the time of contracting, is not separate property in reference to which the married woman can be presumed to have contracted.

A married woman may shew in answer to an action against her upon a covenant in a mortgage made by her husband and herself containing no recital of her ownership, given to secure part of the purchase money of land purchased by the husband, but conveyed to her, that the conveyance was taken merely as trustee for her husband, and not for her benefit; and this although the mortgagee or those claiming under him had no knowledge of her position.

Judgment of STREET, J., reversed.

**Statement.** THIS was an appeal by the defendant Agnes Helen Warren from the judgment of STREET, J.

The action was brought against Frederick Warren and his wife, Agnes Helen Warren, to recover \$500 and interest, under a mortgage made by them on the 11th of July, 1892, in favour of J. H. McQuay, and assigned by him to the plaintiff, who was his sister.

The mortgage contained the usual covenant for payment, and was given to secure part of the consideration for the lands included in it, conveyed to Agnes Helen Warren by McQuay.

Judgment was granted on motion as against Frederick Warren, and the action came on for trial as against Agnes Helen Warren on the 28th of April, 1896, at Whitby, before STREET, J.

Her defence was that the lands had been conveyed to her as a nominee for her husband; that she had no separate estate, and no capacity to contract; and that McQuay and the plaintiff were aware of the facts.

It was proved that an agreement had been entered into between McQuay and Frederick Warren for the exchange of properties; that McQuay's property was conveyed to Agnes Helen Warren at Frederick Warren's request; that she had no beneficial interest in the property conveyed to

her, and that until the equity of redemption was foreclosed by a prior mortgagee Frederick Warren collected the rents ; that the mortgage executed by her was revised by her solicitor and executed by her in his presence ; and that the mortgage had been assigned to the plaintiff for valuable consideration without notice that Agnes Helen Warren was only nominal owner of the land. Statement.

The marriage settlement of Agnes Helen Warren, made on the 19th of September, 1891, was put in. Under it certain funds were vested in trustees upon trust to pay the income to her " during her life for her separate use, \* \* and so that she shall not have power to deprive herself thereof by an alienation mortgage charge or disposition in anticipation," and after her death to hold the trust funds and the income thereof upon such trusts as she should by deed or will appoint, and in default of appointment in trust for her children, and if no children then over. It was not shewn that any income had accrued due at the time the mortgage was given.

STREET, J., held that the property conveyed to Agnes Helen Warren " was separate property sufficient to support the covenant as between her and the mortgagee. The plaintiff was perfectly justified in assuming that the property was hers, and it would have been a fraud on her to have concealed the fact that there was a trust if there was one. The mortgagee and the plaintiff got her covenant, they having every reason to suppose that it was her separate property, it having been conveyed to her ; they got it, and they were entitled to rely upon it," and he gave judgment in the plaintiff's favour.

The defendant Agnes Helen Warren appealed, and the appeal was argued before OSLER, and MACLENNAN, JJ. A., and MACMAHON, J., on the 17th of November, 1896.

*F. W. Carey*, for the appellant. It cannot be disputed on the evidence that the appellant was merely a nominee for her husband ; the property, therefore, did not belong to her and was not separate estate in respect of which she



**Argument.** could contract. Nor is the property covered by the marriage settlement separate property in respect of which she could contract: *In re Armstrong*, 17 Q. B. D. 167.

*H. M. Ludwig*, for the respondent. The appellant made the mortgage to secure part of the consideration for the land conveyed to her and she cannot now escape liability by attempting to shew that she took the land merely as nominee of her husband. She executed the mortgage deliberately under legal advice, and she is estopped from denying liability. The plaintiff took the mortgage without any notice of any of the facts, and it would be a fraud on her to give effect to the defence now set up.

*F. W. Carey*, in reply.

January 12th, 1897. OSLER, J.A.:—

The plaintiff sues as assignee of a covenant contained in a mortgage bearing date the 11th of July, 1892, made by the defendants to one McQuay, for payment of the mortgage money, the defendant Agnes Helen Warren being then and now the wife of the other defendant Frederick Warren. The question is, whether she was at that time possessed of separate property. She was not shewn to have been engaged in carrying on any trade or business of her own.

The rule is that the plaintiff in such a case must prove affirmatively that the married woman had at the time of contracting the obligation sued on free alienable separate property, of such a nature that she might reasonably be presumed to have contracted with regard to it.

It was proved that Warren had agreed to exchange property of his own for property of McQuay's, being the land comprised in this mortgage, and to give the latter in equalization of values a mortgage for \$600 on the land so taken by him in exchange. That at Warren's request McQuay conveyed it to his wife, and that both husband and wife reconveyed it by way of mortgage to secure the balance of the purchase money or exchange value, both also joining in the covenant to pay. *Primâ facie*, there-

fore, the plaintiff's case was proved, as the conveyance to the wife at the husband's request would be presumed to be intended as an advancement for her. Contrary, however, to my first impression, I am of opinion that the case thus made was displaced by the evidence for the defence, which rebuts the presumption of advancement and leaves the case simply as one in which the husband having paid or become liable for the consideration is the real and beneficial owner of the property and the wife merely his trustee of the legal estate. The evidence was admitted without objection, but it was clearly admissible and could not have been successfully objected to: *Worthington v. Curtis*, 1 Ch. D. 419. I see no reason to discredit this evidence, and the learned trial Judge does not seem to have done so, though he gave no effect to it for a different reason.

Judgment.  
OSTLER,  
J.A.

Unless, therefore, for some reason, the wife is estopped from saying that she was not the beneficial as well as the legal owner of this property, the plaintiff fails so far as she depends upon it for the purpose of entitling herself to judgment against her.

I think there is no estoppel. The mortgage contains no recital that the wife is solely interested, and as the husband is a granting as well as a covenanting party thereto, that can only have been, as regards the first, because he had some beneficial interest to be bound and conveyed thereby. There is no representation by the mortgage itself, or outside it, that the property was the wife's separate property, which could have misled the mortgagee; nor is there any evidence that he was in fact misled into taking the wife's covenant, relying upon the conveyance to her as giving her separate property which would support it. His position seems not practically different as regards the wife's or husband's right to shew that this property was not her separate property, from what it would have been had he obtained judgment against her on proof that she possessed some other property and had then endeavoured to enforce it by selling the equity of redemption in this property on such judgment.

**Judgment.****OSLER,  
J.A.**

The two questions, therefore, upon which this part of the case turns, viz., whether the wife was trustee for her husband of the property in question, and whether it is open to them to prove such fact, must both be answered in the affirmative.

On the appeal, though not I think at the trial, it was argued that even if the wife succeeded in proving that the property which McQuay had conveyed to her was not her separate property she was possessed of such property under her marriage settlement of the 19th of September, 1891. I think this contention also fails. By the terms of the settlement the trustees are directed to pay the income of the settled fund to Mrs. Warren for her life for her separate use, and without power of anticipation, and after her death to hold the *corpus* and the annual income arising therefrom upon such trusts as she should by any deed or will appoint, and in default of appointment for her children, and should there be no children, then for her sister.

None of the income was shewn to have accrued due so as to be relieved from the restraint on anticipation: *Hood-Barrs v. Heriot*, [1896] A. C. 174, and Mrs. Warren had not exercised the power of appointment.

The case of *In re Armstrong*, 17 Q. B. D. 167, is a recent decision of the Court of Appeal that a general power of appointment by deed or will of which a married woman is donee, but which she has not exercised, is not separate property within the meaning of the Married Woman's Property Act, 1882, which creditors can reach so as to exclude those entitled in default of appointment.

Our Act, which is similar in its terms to the English Act, though of course the particular section relating to a bankrupt married woman trader which was in question in the above case is not to be found here, must be construed in the same way, and therefore it must be held that the settled property here in question is not separate property within the Act which is available to satisfy the contracts of the married woman.

It is unnecessary to decide how the case would have

been had the property been limited in default of appointment to the executors or administrators of the donee of the power. I refer to Lush's Law of Husband and Wife, 2nd ed., pp. 142, 143, where the authorities are noted.

Judgment.

OSLER,  
J.A.

The appeal, I think, must be allowed.

MACLENNAN, J.A. :—

It was sought to maintain the judgment in two ways. First, it was said that the appellant had separate property under her marriage settlement made in England in September, 1891, which would support her liability; and then it was said that the land included in the mortgage itself, which contained the covenant sued upon, having been conveyed to her immediately before the making of the mortgage, was sufficient for that purpose. The English property is personal estate settled to her separate use for life without power of anticipation, and after her death to such uses as she might by deed or will appoint, and in default of appointment to the children of the marriage, and if no children and no appointment, then to her sister absolutely. It was not shewn that at the date of the covenant in question there was any income of the settled property which had accrued due, so that she might be regarded as having contracted with respect to it, as she might have done on the authority of the recent case of *Hood-Barrs v. Heriot*, [1896] A. C. 174; and it seems to be now settled by the Judicial Committee that a general power of appointment over a fund possessed by a wife, under which she could appoint it to herself, will not support a debt or engagement on her part. In *London Chartered Bank v. Lempriere*, L. R. 4 P. C. 572, the opinion of Turner, L. J., in *Johnson v. Gallagher*, 3 De G. F. & J. 404, is quoted with apparent approval, in which he says that there can not be any reasonable doubt that the debts and engagements of a married woman cannot prevail against the parties entitled in default of appointment. I think, therefore, it is clear the judgment cannot be supported by the settled property.

**Judgment.** The ground upon which the learned Judge rested his judgment was the property comprised in the mortgage. The husband had agreed with the vendor for an exchange of lands, and when the conveyance came to be made he took it in the name of his wife, and he and she joined in making the mortgage in question, which was part of the consideration for the exchange. The whole of the consideration for the purchase was given by the husband, with the exception of the covenant in question, and in that also the husband joined. Being a case of husband and wife, there is *prima facie* no resulting trust for the husband, and the presumption is that it was intended as a gift to the wife. The defence set up by the wife is that the conveyance was made to her without her knowledge, at the request of her husband, for purposes of his own, that she executed the mortgage at the request of her husband and without professional advice or explanation, and that her covenant was a mistake. She also sets up that it was not intended that she should acquire any beneficial interest in the lands, and that the intention was that she should be a trustee for her husband. Both husband and wife were examined, and their evidence was received without objection. The former declares in the strongest terms that it was conveyed to her at his request, and for purposes of his own, so that he could deal, with it and not as a gift, or with the intention that it should become her property. The wife is equally clear and positive that the land was not hers, nor so far as she knew intended to be hers. That evidence is in no way contradicted, nor is it qualified by any of the surrounding circumstances, except the making of the mortgage itself. Upon that evidence the question arises whether the presumption of a gift to the wife is rebutted. The learned Judge thought it was not, that there was no evidence of a trust. He seems also to have thought that parol evidence of the trust ought not to be regarded, for he says "there is no trust on the face of the instrument." He also thought that it was a fraud on the wife's part to conceal the trust. With great respect,

MACLENNAN,  
J.A.

I think the judgment wrong. It is clear that the trust need not be expressed in writing in order to rebut the presumption of a gift; all the authorities agree in that. It is a question of intention, and the verbal declaration of the purchaser at the time is sufficient for that purpose: *Dyer v. Dyer*, 1 W. & T. L. C., 6th ed., pp. 263-4; Lewin on Trusts, 8th ed., pp. 175-6-7; *Grey v. Grey*, 2 Swans. 594; *Devoy v. Devoy*, 3 Sm. & G. 403; *Worthington v. Curtis*, 1 Ch. D. 419. This last case was a question between a father and the representatives of his son, in which it was held by the Court of Appeal on the evidence of the father that the presumption of an advancement was rebutted. I therefore think the trust was sufficiently proved at the trial.

Judgment.  
MACLENNAN,  
 J.A.

There is still the question whether the defendant is in any way estopped as between her and the plaintiff from setting up the trust, and I do not think she is. A purchaser may always require the conveyance to be made to a third person. Such a requirement does not import any change in the contract as between the vendor and the purchaser. But when a mortgage is to be given back for part of the purchase money the vendor may probably be entitled to insist on getting the usual covenants, not only of the purchaser, but of the nominee to whom he has been required to make the conveyance. That is all that was done here and I am unable to perceive that the mortgagee had any right to assume, without enquiry, that the conveyance was taken to the wife for her own benefit and not as a trustee for the purchaser. If there is any estoppel it must arise from the mortgage itself, as containing a representation that she was the beneficial owner. The mortgage is in the form of a joint mortgage by both husband and wife. It contains no recitals, and the covenants for title are joint as well as the covenant for payment. Therefore, if the deed represents anything it is that both grantors have some interest. The mortgagee knew by the terms of the deed that the legal title was wholly in the wife. The only title, therefore, which the husband could be supposed

**Judgment.** to have, by any inference to be drawn from the mortgage,  
**MACLENNAN, J.A.** is some beneficial interest. I therefore think there is no  
estoppel in the case: *General Finance, etc., Co., v. Liberator, etc., Society*, 10 Ch. D. 15; *Heath v. Crealock*, L. R. 10 Ch. 22.

I am, therefore, of opinion that the plaintiff has failed to make out that the wife was possessed of separate estate when she entered into the covenant in question, and that the appeal should be allowed.

**MACMAHON, J.:**—

The view I entertained during the argument and up to the time I had an opportunity of carefully considering the judgments of my learned brothers was in accord with that of the trial Judge. I am now satisfied from a consideration of the judgments just read that the opinion I entertained was erroneous. I consider, however, as neither McQuay, the mortgagee, nor the plaintiff, his assignee, had notice of any trust in favour of Frederick Warren, that the appeal should be allowed without costs.

*Appeal allowed.*

R. S. C.

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## PETMAN V. CITY OF TORONTO.

*Municipal Corporation—Local Improvements—Increase of Cost.*

The extension of a street was petitioned for as a local improvement by the requisite number of owners, and the petition was acceded to by the Council and a by-law passed for the purpose, the cost being estimated at \$14,500, an assessment for that sum being adopted by the Court of Revision after notice to the persons interested. After some delay the Council purchased the land required at a price much greater than the estimate and passed a by-law levying over \$36,000 for the work. No work was done on the ground and no notice of the second assessment was given :—

*Held*, that an opportunity of contesting the second assessment should have been given, and that the by-law was invalid.  
Judgment of ROSE, J., affirmed.

THIS was an appeal by the defendants from the judgment of ROSE, J. Statement.

The plaintiffs were the owners of land on North Gladstone avenue, formerly called Hamilton street, in the city of Toronto, and brought the action on behalf of themselves and all other property owners on North Gladstone avenue to have a by-law declared invalid.

Gladstone avenue ran north from Dundas street in the city of Toronto, and Hamilton street ran south from Bloor street in the same line. Between the north end of Gladstone avenue and the south end of Hamilton street there was a large tract of land without any street frontage, and in April, 1887, the plaintiffs and other property owners on Hamilton street, petitioned the council of the city for the extension, as a local improvement, of Gladstone avenue to Hamilton street. On the 23rd of May, 1887, the council adopted the report of the Committee on Works, based upon the recommendation of the city engineer, and authorized the work to be done as a local improvement, at an estimated expenditure of \$14,500, made up as follows : \$9,000 for the lands required ; \$5,000 for grading, and \$500 for fencing. There was some difficulty, however, and on the 10th of October, 1887, the defendants rescinded the authority but the matter was brought up again, and the work was



**Statement.** again authorized, and in June, 1889, the matter was referred to the Court of Revision, and the assessment confirmed.

On the 11th of November, 1889, the defendants passed a by-law declaring that Gladstone avenue was thereby extended and opened from its northerly terminus to Hamilton street, and that certain lands described in the by-law, required for the extension, were adopted, established and confirmed as part of one of the public streets and highways of the city, to be known as Gladstone avenue, and the city engineer was directed to forthwith open up the street and to make it fit for public use.

After this proceedings were taken for the acquisition of the necessary land, and \$32,234 were paid by the defendants to the owners of that land. No work was done, and when the action was brought there was in fact no street or highway extending from Gladstone avenue to Hamilton street.

On the 2nd of February, 1891, the defendants passed a by-law, which, after reciting that Gladstone avenue had been extended, and that the total cost of the extension was \$36,180.22, imposed a rate of sixty-nine cents and three mills per foot for ten years on all property from Dundas street to Bloor street, on both sides of Gladstone avenue and Hamilton street. This rate was placed in the tax bills for the year 1891. The plaintiffs did not pay this special rate, though some of the other owners did; and in the year 1894, the plaintiffs' lands were advertised for sale for non-payment of taxes. The plaintiffs then brought this action claiming a declaration that the defendants had no right to charge any part of the sum of \$36,180.22 against the lands on Hamilton street, or to levy any rate in respect of that sum, and an injunction restraining the defendants from selling the lands.

By 54 Vict. ch. 82 (O.), the by-law in question, and other by-laws of the city, were validated and confirmed, but by 55 Vict. ch. 90 (O.), this Act was modified, and by-laws in respect of which actions were pending were excepted.

The action was tried at Toronto, on the 9th of October, 1895, before ROSE, J., who gave judgment in favour of the plaintiffs, declaring the by-law invalid, and directing the defendants to repay all assessments, with interest thereon, collected by them in respect of properties on Hamilton street under the by-law with a reference to take an account as to these assessments if the parties differed. The learned Judge thought that there were a number of fatal objections to the by-law, but based his judgment mainly on the ground that it was not sufficient for the city to merely purchase the land and declare it to be a highway, but that the city was also bound, before being in a position to assess the owners with any part of the cost, to make a street on the part purchased, of the same kind as the streets already existing which were intended to be connected by the new work. Statement.

The defendants appealed, and the appeal was argued before BURTON, OSLER, and MACLENNAN, JJ. A., on the 12th and 13th of November, 1896.

*Fullerton, Q.C., and T. Caswell*, for the appellants. The word "extend" must be taken in its ordinary and usual meaning, and includes only the obtaining by the corporation of the land necessary for the proposed street. A street is "extended" when the public have obtained the right of passing over the part opened or extended, and of using it as a highway. To say that the word includes more, would involve the result that if a street with asphalt or other expensive pavement were extended, it would be necessary to pave the newly opened part with the same kind of pavement. It is the proper course for the municipality to first obtain the land necessary, and to then allow the property owners to determine to what extent the street should be improved, and what kind of pavement should be used. Any other procedure would be highly inconvenient. The judgment is, at all events, wrong in directing the appellants to return to the plaintiffs and

**Argument.** those whom they represent, the sums which they have paid under the by-law: *Bain v. Montreal*, 8 S. C. R. 252. No such order is asked in the pleadings, and no evidence was given upon the question.

*W. Macdonald*, for the respondents. The by-law is clearly invalid. Under sec. 613, sub-sec. 1, of 55 Vict. ch. 42 (O.), the local improvement rate is to be imposed upon the property fronting or abutting upon or extending to within six feet of the street where the work is to be done. Section 615 provides that a general by-law ascertaining the property to be benefited, is sufficient. The city has passed a general by-law, under which all assessments authorized under section 612 may be made. Under this general by-law they have attempted to impose a rate on the Hamilton street property which does not front upon the proposed extension. The Hamilton street property could only be assessed under section 621, sub-secs. 1 and 2, which provide that in the case of a street extension where it is inequitable to assess the whole cost on the lands fronting on the extension, the council are to determine the portion to be assessed upon the lands benefited not fronting on the extension. This determination is a judicial act which must be exercised by by-law. No such by-law was passed, and the case is not, therefore, brought within the local improvement clauses of the Act at all: *Fleming v. Toronto*, 19 A. R. 318; *In re Gillespie and Toronto*, 19 A. R. 713; *In re Hodgins and Toronto*, 26 O. R. 480; 23 A. R. 80. It is no answer to this objection to say that the Hamilton street owners petitioned for the improvement. This petition only authorized the council to act judicially and in accordance with the provisions of the statutes. Then no work has in fact been done, so that there is no "improvement" within the meaning of the Act, and no right to make an assessment. The buying of land is not a work or improvement. Something more than that is contemplated, for the mere purchase of land is not a benefit to the locality; it must be made available for the use for which it has been

bought. Even if, however, the work comes within the local improvement clauses, the procedure has been improper and invalid. Two modes of procedure are provided: The council must either pass a by-law authorizing the work with an estimate of the cost, and then submit the proposed assessment to the Court of Revision, and when confirmed, make a levy, with a supplementary assessment if this amount turns out to be insufficient, or else they must do the work first, and the cost having been thus ascertained, then make an assessment. In the present case the first mode was used up to a certain stage, and then an attempt was made to use the second mode. Notice was given of the work at an estimated cost of \$14,500, and an assessment for this sum was confirmed by the Court of Revision. After this the second mode of procedure was adopted, and an attempt is now being made to assess for what is said to be the total cost. (The learned counsel then dealt with certain special objections to the by-law as to form and as to the delay.) It is true that repayment of the rates collected is not asked for in the pleadings. The question was, however, raised at the trial, and it was understood that the judgment should contain a provision as to this.

*T. Caswell*, in reply.

January 12th, 1897. The judgment of the Court was delivered by

BURTON, J. A.:—

The action is brought to declare invalid and illegal certain assessments made under the authority of a by-law passed on the 2nd February, 1891, which authorizes the levy of the sum of \$36,180.22 for a work which had been estimated to cost \$14,500, and for which latter sum an assessment had been made and adopted by the Court of Revision.

A petition signed, as it was assumed, by the requisite

**Judgment.**

**BURTON,  
J.A.**

number of ratepayers, had been presented to the council for the extension as a local improvement of Gladstone avenue by opening up a strip of land lying between the then Gladstone avenue and Hamilton street.

The petition was strongly endorsed by the then engineer for the city, but there was apparently some opposition to the scheme, as it was bandied about from the appropriate committee to the council, and back from the council to the committee, from time to time, until the 11th of November, 1889, when a by-law was passed by the corporation declaring that Gladstone avenue was thereby extended and opened from its northerly terminus to Hamilton street, and the land therein described was declared to be a part of one of the public streets or highways of the city, the whole to be thenceforth known as Gladstone avenue, and was to be forthwith opened up and made fit for public use under the direction of the city engineer, who with workmen, servants and agents, was thereby authorized to enter upon the said lands for the purposes aforesaid.

Very shortly afterwards the lands required were acquired, not for \$9,000, the sum estimated, but at a cost of \$32,234. The disparity in the amounts is so great that it is difficult to understand why the engineer or person employed in the purchase had not stayed his hand and awaited further instructions from the city council.

They were acquired, however, at this enormous increase in price, and have remained in the same condition ever since—not a dollar having been expended in grading, fencing, or improving the same.

The persons originally assessed for the \$14,500, might well have assumed that the whole thing had been abandoned; but in February, 1891, the council passed the by-law now impeached.

It recites the petition, and that it had been ascertained and determined that certain property defined in it on each side of Gladstone avenue, was immediately, directly, equally, and specially benefited by the improvement and work; and that the avenue had been extended, and the

total cost thereof was \$36,180.22, and then proceeds to impose an assessment on the lands which the parties assessed had no opportunity of questioning before the Court of Revision and which they had no notice of until they received their tax bills.

Judgment.

BURTON,  
J.A.

It is difficult to speak of this by-law in the way one would desire to speak of any act of a deliberative body like the city council—conveying, or intending to convey, as it does, the impression that the whole work had been completed, whereas no work whatever had been done, but the land only purchased; and that the property benefited had been ascertained and adjudicated upon in the manner provided by law. It shocks one's sense of justice that an assessment of this kind, increased from \$14,500, or, to speak more accurately, \$9,000, which was the estimate for the land, of which alone they had any notice, to over \$36,000, should be thus attempted to be imposed upon the ratepayers without notice; and the by-law carries upon its face a statement which is manifestly untrue, that all the property was equally benefited by the improvement, but it is a matter of almost equal surprise that an assessment imposed in this way, so contrary to natural justice, should at one time have been validated by legislation; and I can only assume that the real facts were not disclosed when that legislation was sought.

Many objections were raised to the original as well as the last by-law, on the ground that the work did not come within the Local Improvement Clauses of the Act at all, and various others of a very serious character, but as the case can be disposed of on other grounds, I do not propose to consider them. These clauses are very difficult of construction at any time, and it is undesirable to undertake a task of that kind unless absolutely necessary.

It is manifest in this case that the law in reference to notice or advertisement has been entirely ignored, and that the parties assessed have not had an opportunity of contesting the amounts assessed, and had no notice until served with their tax bills; such an assessment must be

Judgment. manifestly illegal and void, and the by-law cannot be upheld.

BURTON,  
J.A.

As to that portion of the judgment which decrees a return of the sums paid, it was founded originally upon the supposed consent of the defendants ; but as that consent is denied, and the learned Judge has accepted that denial, it is not competent for us in the present state of the record to deal with it. No such case is made upon the pleadings, and no amendment was made at a time when the whole question could have been discussed. With that variation, the judgment is affirmed, and the appeal dismissed.

*Appeal dismissed.*

R. S. C.

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## IN RE FERGUSON, BENNETT V. COATSWORTH.

*Will—Construction—“My Own Right Heirs”—Condition Precedent.*

A testator, who left him surviving his widow and one daughter, devised specifically described property to his daughter, and the residue of his estate to his executors upon trust for his widow and daughter in certain events with limited power to the daughter to dispose thereof by will. He then directed that “in case my daughter shall have died without leaving issue her surviving and without having made a will as aforesaid, my trustees shall (after the death of my wife if she survive my said daughter) sell all my estate, real and personal, and divide the same equally amongst my own right heirs, who may prove to the satisfaction of my said trustees their relationship within six months from the death of my said wife or daughter, whichever may last take place.”

The daughter died unmarried in her mother's lifetime, having made a will assuming to dispose of the residue:—

*Held*, that the daughter was entitled to take as the “right heir” of the testator.

*Bullock v. Downes*, 9 H. L. C. 1; *Re Ford, Patten v. Sparks*, 72 L. T. N. S. 3; *Brabant v. Lalonde*, 26 O. R. 379; and *Thompson v. Smith*, 23 A. R. 29, referred to.

MACLENNAN, J.A., held also that upon the language of the will, apart from the clause above set out, the daughter took in fee, subject to the widow's rights, and that failure to make a will was a condition precedent to this clause taking effect.

Judgments of *BOYD, C.*, in *Coatsworth v. Carson*, 24 O. R. 185, and *In re Ferguson, Bennett v. Coatsworth*, 25 O. R. 591, reversed upon grounds not argued before him.

THIS was an appeal from the judgment of *BOYD, C.*, Statement. reported 25 O. R. 591, explaining his previous judgment, reported *sub nom. Coatsworth v. Carson*, 24 O. R. 185, construing the will of one Edward Ferguson. The material portions of the will in question are set out in the report below, and in the judgment of *MACLENNAN, J.A.*, in this Court.

The appeal was argued before *HAGARTY, C.J.O.*, *BURTON, OSLER*, and *MACLENNAN, J.J.A.*, on the 26th of September, 1895, and on the 14th of January, 1896 the Court directed parties to be added and the appeal to be re-argued.

The re-argument took place before the same Judges on the 26th of May, 1896.

*O. R. Macklem*, for the appellants.

*W. Mortimer Clark, Q. C.*, for the respondents *Samuel Ball et al.*



Statement. *Moss, Q. C., and J. W. McCullough*, for the respondents *Carrie Egglestone et al.*

*J. R. L. Starr*, for the respondents *Annie Turner et al.*

*F. E. Hodgins*, for the trustees.

January 12th, 1897. HAGARTY, C. J. O.:—

Although the first provision as to the daughter disposing by will refers to her having survived her mother, it seems to me that the last clause apparently contains the power to devise, although she did not survive her mother.

I am of opinion that the words "my own right heirs," mean those who were such heirs at his death, and not the right heirs at the daughter's death.

As she filled the position of the testator's heir at his death, the estate became hers absolutely on the mother's death, and until such death it was her estate subject to the mother's interest.

I think there is nothing in the will to prevent the full application of the rule laid down in *Bullock v. Downes*, 9 H. L. C. 1, followed and fully recognized in the Court of Appeal in *Re Ford, Patten v. Sparks*, 72 L. T. N. S. 5, and by Street, J., in *Brabant v. Lalonde*, 26 O. R. 379, and in our own decision in *Thompson v. Smith*, 23 A. R. 29. I do not think the case is open to the view or remark that seems to have influenced Sir W. Grant's judgment in *Jones v. Colbeck*, 8 Ves. 38, that the testator could hardly have meant his daughter to be reckoned his next of kin at his death, as he had already provided for her, and he would not have "taken this strange circuitous method of giving her the whole residue if she died without children."

In this case it is clear that his only daughter, subject to his widow's provision, was the chief object of benefit, as the whole estate went to her in named events.

When she made her will, her mother's life estate, as her survivor, was outstanding.

The reversion or remainder was the daughter's property. We are not asked to construe her will.

It seems sufficient to declare the ultimate vesting of the estate in her as her father's right heir, and this construction renders it, as I think, unnecessary to discuss the claims set up by the various parties who appeared before us.

Judgment.  
HAGARTY,  
C.J.O.

BURTON, J. A. :—

I think that our decision in *Thompson v. Smith*, 23 A. R. 29, governs this case.

OSLER, J. A. :—

I also think that *Thompson v. Smith*, 23 A. R. 29, governs this case.

MACLENNAN, J. A. :—

When the appeal came on for argument, it was found that proper parties for the decision of the questions raised were not before the Court, and it stood over in order that the necessary parties might be added. By an order dated the 11th of February, 1896, the defendant Carrie W. Egglestone was appointed as the legal personal representative of the estate of her mother, the late Jane Purdy or Egglestone, for all purposes of the action, including the appeal, and the defendant Emily Barnes was thereby in like manner appointed as the personal representative of the estate of Jane Ball, the testator's sister. By the same order also the said Carrie W. Egglestone, Emily Barnes, and Edward Galley, the executor of the estate of Jane Ferguson, the testator's daughter, were added as parties defendants, and it was ordered that they should be bound by all the proceedings had and taken in the action. Afterwards, the appeal case was, by order, amended by adding the new parties, and correcting certain verbal errors therein.

The appeal was argued on the 26th of May, and by direction of the Court, and consent of parties, an appeal from the judgment in the other action of *Coatsworth v. Carson*,

**Judgment.** of the 12th of October, 1893, as amended by the order of the  
**MAULENNAN, J.A.** 22nd of October, 1894, was argued at the same time, the second action being merely subsidiary to the first, and involving the same questions. At the time of the argument, another case of *Thompson v. Smith*, involving a similar point, was pending in the Supreme Court of Canada, on appeal from this Court, 23 A. R. 29, and it was thought expedient to await the decision of that case before giving our judgment. Unfortunately, that appeal has not yet been argued, and the parties have requested that our judgment should be no longer delayed.

The testator made his will on the 30th of July, 1870, and died on the 9th of January, 1874. He left him surviving his widow, and his daughter Jane, who was his only child. He also left one sister, Jane Ball, a widow with a large family, and William Purdy and Jane Purdy, children of a deceased sister, Eliza Purdy. By his will the testator gave his daughter Jane his house and premises on Parliament street, in fee simple for her separate use. He gave the rest of his property, real and personal, to his executors, upon trust, after payment of his debts, etc., for his wife and daughter during their joint lives, and while his wife remained unmarried; if his wife married in the daughter's lifetime, the wife was to have one-third of the income for life, and subject thereto, the whole in trust for the daughter for life, for her separate use; if the wife should not marry in the daughter's lifetime, and should survive her, then after the daughter's death without issue her surviving, in trust for the wife for life; if the daughter should have left issue her surviving, then upon trust as to one-half for the wife for life, and subject thereto, for the issue of the daughter in equal shares; if the daughter should survive the wife, then in trust for the daughter in fee for her separate use. The will then proceeded thus: "And further, that in the event of my daughter surviving my said wife, in which event the property becomes hers as aforesaid, I empower her, notwithstanding her coverture in case she shall marry, to dispose by will

of all or any part of the said property, and I declare that in case she shall dispose of any part thereof by will or otherwise, for the advancement of the comfort and education of the female blind, making any such disposition upon proper legal advice, such disposition will be in accordance with my present wishes, but I do not charge or request her so to dispose thereof." The only further material part of the will is the last part of clause five, which is as follows: "I direct that in case my daughter shall have died without leaving issue her surviving and without having made a will as aforesaid, that my trustees shall (after the death of my wife, if she survive my said daughter) sell all my estate, real and personal, and divide the same equally amongst my own right heirs, who may prove to the satisfaction of my said trustees their relationship within six months from the death of my said wife or daughter whichever may last take place."

Judgment.  
MACLENNAN,  
J.A.

The daughter Jane died before her mother, on the 15th of February, 1892, without ever having been married, and having made a will, bearing date the 23rd day of April, 1877, of which the defendant Galley is the executor, and in which she assumed to dispose of her father's residuary estate, as well as of the Parliament street property.

The widow died on the 1st of February, 1893. The question is who, in the events which have happened, are entitled to the residue of the testator's property, which is composed both of real and personal estate?

In the case of *Coatsworth v. Carson*, the learned Chancellor determined that the parties entitled under the description of "my own right heirs," were those persons who would, prior to the 1st day of July, 1886, take the real estate of the testator as upon his death intestate, and declared that the testator's daughter Jane had no power to devise the lands in question. Looking at the report of the case, 24 O. R. 185, it does not appear to have been suggested that the daughter Jane could be regarded as the testator's right heir. She is not even mentioned in the report of the argument and judgment, nor is it there

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**Judgment.**

**MACLENNAN,**  
**J.A.**

stated that any counsel appeared on behalf of her executor, Mr. Galley. The declaration in the judgment that she had no power to devise the lands, was, however, probably intended to express that upon the true construction of the will Jane was not to be regarded as the testator's heir.

That judgment was supposed not to have decided at what time the testator's right heirs were to be ascertained. Accordingly, that question came before the learned Chancellor in the case of *In re Ferguson, Bennett v. Coatsworth* on appeal from the report of the Master in Ordinary, and he determined that the heirs were to be ascertained at the death of the daughter : 25 O. R. 591.

It is those judgments which are now in review before us. The first question is, whether the daughter Jane, is not to be regarded as her father's right heir within the meaning of the will, and if not, and if she is to be excluded, then whether the persons who were the testator's heirs at his death, or rather who would have been such if Jane had then been dead, are entitled, or those who would have been such at the death of Jane? As I have said, the learned Chancellor does not deal expressly with the first question; and the reason he gives for deciding that the heirs are to be ascertained at the daughter's death is that until then she herself was the testator's right heir.

It is now contended that in the events which have happened his daughter Jane became, and that her executor is now, entitled to the whole of the testator's residuary estate. That is the contention of counsel for Mr. Galley, executor of Jane's estate, and of those, or some of those, who are devisees or legatees under her will. The other parties dispute the claims of Jane and her estate altogether, and contend that the property belongs to those who would have been the testator's right heirs if Jane had predeceased her father. There again they differ among themselves, some contending that the heirs should be ascertained at the testator's death, and others, that they should be looked for at the death of the daughter, as decided by the learned Chancellor.

The first question is whether the daughter's executor is entitled to anything, and if so, to what extent.

Judgment.  
MACLENNAN,  
J.A.

Putting the limitations of the third clause of the will in more precise language, and having regard to the fact that the widow did not marry again, and that Jane died before her mother, the effect of that clause is this: The legal title of the residuary real and personal property is vested in the executors upon the following trusts: The mother and daughter are to be tenants in common for their joint lives; if the daughter die first, without leaving issue her surviving, remainder to the widow for life; if the daughter die first, leaving issue her surviving, remainder in one-half to the widow for life, remainder in both halves to the daughter's issue in equal shares absolutely; if the daughter survive her mother, remainder to the daughter absolutely for her separate use.

The case we have to consider is that of the daughter dying before her mother, without leaving issue her surviving. The clause deals with both real and personal estate together, and its effect upon the real estate must first be considered. It is then a devise to two persons as tenants in common for life, and remainder to the issue of one of them in equal shares, and if that one die without issue her surviving, then over to the other tenant in common for life. The effect of such a limitation of land is, according to the authorities, an estate tail in the first tenant in common in one undivided moiety, a contingent remainder in fee in the issue of that tenant in common in the other moiety, a life estate to the second tenant in common in the other moiety, and an executory devise over to the second tenant in common for life in the first moiety, in the event of the first dying without leaving issue at her death: 2 Jarman, 5th ed., pp. 947, 8, 1187; *Doe v. Rucastle*, 8 C. B. 876; *Marshall v. Grime*, 28 Beav. 375; 2 Jarman, 5th ed., pp. 1263-4, 1271, 1283-4. Therefore, the effect of clause three as a dealing with the testator's residuary real estate, was, in the events which happened, that the widow was tenant for life of one undivided moiety, Jane

**Judgment.** was tenant in tail of the other undivided moiety, with a contingent remainder in fee to her issue in the first moiety, and an executory devise over to the widow for life in Jane's moiety in the event of Jane's dying first without leaving issue her surviving. Jane, therefore, might have barred the entail and also the executory devise in one moiety, and might have made herself tenant in fee simple thereof. She did not do so, however, and her estate tail came to an end at her death without leaving issue her surviving. The contingent fee to her issue in the other moiety also failed for the same reason, and the executory devise only took effect in a life estate to her mother in both moieties. It is now to be observed that the only event in which the ultimate fee simple was disposed of by clause three, was in case the daughter survived her mother, which did not happen. Therefore, if the will had stood upon clause three, there would have been an intestacy of the residuary land at the widow's death.

The next question is, what was the effect of the disposition expressed in clause three upon the personal estate. It seems now to be settled that a bequest of personalty to one for life, and after her death to her issue, confers only a life estate on the parent, and that the issue take as purchasers: *Ex parte Wynch*, 5 D. M. & G. 188; 2 Jarman, 5th ed., pp. 1372-4; Hawkins, p. 197; Theobald, 3rd ed., p. 350; and as there was no gift over at Jane's death without leaving issue, except a life estate to her mother, there was also an intestacy of the residuary personal estate at the death of the mother, so far as it depended on the third clause of the will.

It is now necessary to consider the other parts of the will.

Clause four provides that the provision for his wife was to be in lieu of her dower, and all other claims upon his estate, real or personal, and then follows the provision already quoted, empowering Jane to make a will. It is divided into two parts. The first empowers her notwithstanding her coverture in case she shall marry, to dispose

by will of all or any part of the said property, and he prefaces it by saying that he gives that power in the event of her surviving her mother, in which event his property becomes hers. It is difficult to perceive what was in the mind of the draftsman when penning this clause. He was careful to declare all the gifts to Jane to be for her separate use, and it required no authority from the testator or any one to enable her to make a will of any property so declared. It was suggested at the bar that the clause was intended to overcome a difficulty caused by the decision of *Mitchell v. Weir*, 19 Gr. 568, under the Married Woman's Property Act; but that decision was two years after the making of this will; and moreover, it distinctly recognizes the power of a married woman to make a will in favour of any one she pleased of her equitable, as distinguished from her statutory, separate estate. There can be no doubt, I think, that both members of the clause are wholly inoperative, and they are only important by reason of the reference to them in the fifth clause. For that reason it is necessary to consider the meaning of the clause. The first question is, which property is included in the expression, "in which event my property becomes hers," and I think that includes the Parliament street property as well as all the rest. If she required power to dispose of the residuary estate when it became hers, she equally required power to dispose of the other, for if she survived her mother, she took them all in the same manner, that is, absolutely for her separate use. He had in the previous line spoken of his "estate, real and personal," in reference to his wife's dower, in a sense which included the Parliament street property: and the words he uses immediately afterwards, are "my property," and "all or any part of the said property." Again, in the second part of the clause, he speaks of her disposing of "any part thereof by will or otherwise." Therefore, I think the meaning of the clause is, that the testator intended to give his daughter power generally to make a will of the property devised to her, not merely of the residuary property, but the Parliament street property as well.

Judgment.  
MACLENNAN,  
J.A.



**Judgment.****MACLENNAN,  
J.A.**

I now come to the last clause of the will, which it is contended gives the testator's property to his own right heirs in the events which have happened. The first observation to be made upon this clause is that it also deals with all the testator's estate, real and personal. It makes no exception of the Parliament street property, which was by clause two given to the daughter absolutely. Nor does it make any exception in case of the daughter surviving her mother, in which case the residuary estate, real and personal, was given to her also absolutely. This is evident from the words used, which are, "all my estate, real and personal," and also from the final provision as to proving the relationship within six months from death of wife or daughter, whichever was last to take place. These last words shew that the clause was to operate even if the daughter should be the longer liver, in which case by clause three he had given to her the residue absolutely. Therefore, whether the daughter died before or after her mother, if she left no issue her surviving and "without having made a will as aforesaid" the testator's whole property is to go to the testator's right heirs. If the clause is operative it is an executory devise as regards the Parliament street lands, and also as regards an undivided moiety of the residuary land, and as to the rest of the property it is a gift upon condition or contingency. There are two conditions or contingencies. The first is the death of the daughter without leaving issue her surviving. That condition happened, and if there had been nothing more the gift and devise would have been good. But then there is the other condition, namely, "without having made a will as aforesaid." She did make a will, and unless it can be said that she did not make it "as aforesaid," that condition was not fulfilled, the contingency did not happen and the gift failed. It is a condition precedent unquestionably. It is the creation of an estate, the gift of a legacy upon a contingency: Theobald, 3rd ed., pp. 374-378; 2 Williams's Law of Executors, 9th ed., pp. 1122-1132 and cases cited. Then do the words "as aforesaid" make

any difference? It is contended that the words "as aforesaid" require that the will should have been made after surviving her mother, and under coverture, in order to be a will "as aforesaid." I do not think so. I think, as I have endeavoured to shew, that the power to make a will, which the testator assumed to give, was not confined to the case of her surviving her mother or having married, but was general; therefore, I think the words "as aforesaid," merely refer to the power which he has given and not to the other circumstances. I therefore think that the conditional or contingent gift to the testator's right heirs never took effect, that there was, therefore, an intestacy as to the residuary estate in the events which happened and that the Parliament street property, which was devised to Jane absolutely, was not divested; the general result being that at the testator's death Jane became entitled to the whole of the testator's property, partly as devisee, partly as heir-at-law, and partly as next of kin.

I have examined the cases to which we were referred by Mr. Macklem in support of his contention that the fact of Jane's not having made a will could not be regarded as a condition, but I do not think they establish that view at all. I think this is as clear a case of a condition precedent as could well be imagined, and that the usual effect must be given to it.

In the view which I take of the will, it is not necessary to determine the other questions, but I am of opinion, in accordance with the decision of the House of Lords in *Bullock v. Downes*, 9 H. L. C. 1; and *Re Ford, Patten v. Sparks*, 72 L. T. N. S. 5; and *Thompson v. Smith*, 23 A. R. 29; that the testator's right heirs should be sought for at the time of his death, and that there is nothing in the will to exclude his daughter Jane from being the person to answer the description of his right heir.

The appeal must, therefore, be allowed.

*Appeal allowed.*

R. S. C.

Judgment.  
MACLENNAN,  
J.A.

## BEATTIE V. WENGER.

*Bankruptcy and Insolvency—Assignments and Preferences—Pressure—Security—R. S. O. ch. 124, sec. 3, sub-sec. 3—Sec. 19, sub-sec. 4—Practice—Parties.*

The doctrine of pressure may still be invoked in order to uphold a transaction impeached as a preference, when it is not attacked within sixty days, or when an assignment for the benefit of creditors is not made within that time.

*Per OSLER, J. A.*—The liability of the endorser of a promissory note made by the debtor held by the creditor for part of his debt is not a "valuable security" within the meaning of sub-section 3 of section 3 of R. S. O. ch. 124, and if such a note is given up by the creditor to the debtor in consideration of a transfer of goods impeached as a preference the liability cannot be "restored" or its value "made good" to the creditor or the endorser compelled to again endorse.

*Per OSLER, J. A.*—What is referred to in this sub-section is some property of the debtor which has been given up to him or of which he has had the benefit; some security upon which the creditor, if still the holder of it, would be bound to place a value under sub-section 4 of section 19 of R. S. O. ch. 124.

*Per OSLER, J. A.*—The debtor is not a proper party to an action by his assignee against a creditor to set aside a preferential transfer.

Judgment of the Divisional Court reversed.

## Statement.

THIS was an appeal by the defendant Wenger from the judgment of the Divisional Court.

The plaintiff was the assignee for the benefit of creditors of the defendant Hannah, under an assignment made, on the 2nd of October, 1894, in pursuance of the Act respecting Assignments and Preferences by Insolvent Persons, R. S. O. ch. 124.

The defendants Wenger and Hannah carried on business in partnership for the manufacture and sale of butter from the 1st of March, 1892, until the 1st of May, 1894, when the partnership was dissolved by mutual consent, Hannah then being indebted to Wenger in about \$3,000. For this indebtedness Hannah agreed to give Wenger a note for \$350; a mortgage on Hannah's property for \$750; butter tubs to the value of about \$400, and a promissory note made by Hannah and the defendant Campbell for \$1,600, payable in three months. Hannah was also to deliver to Wenger on or before the 5th of November, 1894, some machinery used in making butter, and Wenger was to pay at maturity a promissory note, for which both he and Hannah were liable, for \$1,300. All

other debts were to be paid by Hannah, and after certain Statement. other accounts had been adjusted, Hannah's net indebtedness to Wenger was about \$2,000.

The \$1,600 note was given, and when it fell due Hannah was unable to pay it, nor was he able to pay the \$350 note. Wenger was at the time engaged in large business transactions and was much in need of money, and on his insisting on payment in cash or in goods, Hannah transferred to him a large quantity of butter, and he gave to Hannah the two notes.

The action was brought to set aside this transfer and was tried at Stratford on the 21st of November, 1895, before ROBERTSON, J., who, after hearing a great deal of evidence, came to the conclusion that the transfer of the butter had taken place on the 1st of August, 1894; that there had been pressure exercised by Wenger, and that the transaction was valid.

Upon motion to the Divisional Court this judgment was reversed, that Court holding, on the evidence, that the transfer took place on the 16th of August; that the onus was, therefore, on the defendants, and that that onus had not been satisfied; and that Court gave judgment in favour of the plaintiff as against the defendant Wenger for \$2,082, the price realized from the butter, with a mandatory order for the delivery by the defendants Hannah and Campbell to Wenger of the \$1,600 note, or, if that note had been destroyed, of a note of the like tenour and effect.

The defendant Wenger appealed, and the appeal was argued before BURTON, OSLER, and MACLENNAN, JJ. A., and FERGUSON, J., on the 29th and 30th of September, 1896.

*W. R. Riddell*, and *F. S. Mearns*, for the appellant. The finding of the trial Judge that the impeached transaction took place on the 1st of August, 1894, is amply supported by the evidence and should not have been interfered with. There is also evidence of pressure, and that pressure is

**Argument.** sufficient to validate the transaction. There was no jurisdiction to order the execution of a new note by Hannah and Campbell, Campbell having been released by a transaction valid between Hannah and Wenger.

*W. C. Mackay*, for the defendant Campbell.

*Garrow, Q.C.*, for the respondent Beattie.

January 12th, 1897. OSLER, J. A. :—

Having given this case the best consideration in my power, I am of opinion that the disposition of the appeal must turn mainly upon the question whether the learned trial Judge was wrong in holding that the transaction impeached by the assignee, viz., the sale or transfer of the butter in satisfaction of the defendant's claim, took place on or prior to the 1st August, 1894. If it occurred on the 16th August, as the Divisional Court have held, I think it would be void under section 2, sub-section 2 (a), the debtor, Hannah, being then insolvent, and, as I should be prepared to hold, to the knowledge of the defendant: *National Bank of Australasia v. Morris*, [1892] A. C. 287, and the assignment for the benefit of his creditors having been made within sixty days thereafter.

I may say at once that I am with all respect unable to agree with the Divisional Court in adopting the 16th of August as the date of the sale of the butter. They would appear to have taken that date from a rough statement of account made out by the defendant Hannah for the assignee some time after the assignment. The explanation given by him and accepted by the learned trial Judge seems a reasonable one, viz., that he took it from the date of the warehouse receipt for the butter, subsequently made out by Wenger and sent to him in Wenger's letter of the 14th of August, to be signed by Wilson, the warehouseman, and which in all probability would bear that date. This letter put in by the plaintiff at the trial was written *ante litem motam*. It seems to be a straightforward business document which shews, I think, conclusively, that the

sale had taken place some time previously, and alludes to it as a closed and completed transaction. If it was before the 14th of August there is nothing that I have been able to discover in the evidence which would justify us in assuming that it was on any date later than the 1st of August, as the learned trial Judge has held after a very careful examination of the evidence. He has given credit to statements of Wenger and Hannah, and has pointed out how in his opinion their evidence on the subject is corroborated by other circumstances. I agree with the learned counsel for the plaintiff that the appearance of the memorandum of sale is not satisfactory, but the case does not depend on it alone; and the finding of the trial Judge, which, on such a question as this (turning as it does so much upon the credit to be given to the witnesses on the very point of fact) we are bound to respect, repels the suggestion that the document has been tampered with or patched up for the occasion.

Judgment.

OSLER,  
J.A.

The sale, then, having taken place not later than the 1st of August, the case is not within the danger of section 2, sub-section (2), clause (b), in that it is not to be presumed to have been made with intent to prefer or to obtain an unjust preference. And it may be sustained by any evidence which rebuts such intent. The learned Judge has held upon the whole of the evidence that it was made "in good faith and honestly and without the intent which the statute declares shall be necessary to make the transaction void." If this finding depended upon one ground which the learned Judge relies on, namely, that Wenger was not aware of Hannah's failing condition, I should feel great difficulty in supporting it, because his letter to the firm's creditors, Hesson & Co., written a few days after the dissolution of partnership between Hannah and himself, and his general knowledge of his former partner's affairs, are very strong to shew that he well understood Hannah's position. On this point I think that sufficient weight was not attached to those circumstances by the learned Judge. But on another ground, which is also a question of fact,

Judgment.

OSLER,  
J.A.

upon which he has expressly put his judgment, I have come to the conclusion that it ought to be upheld, namely, that the transaction was brought about by the exercise by the defendant Wenger of legitimate and real pressure upon Hannah for the settlement of his claim.

It was not necessary in the view the Court below took of the date of the transaction for them to deal with this point, and they do not refer to it. It is, however, quite open to the defendant Wenger to rely upon it here, as he did at the trial, and I agree with the learned trial Judge that the evidence upon it is reasonably clear. A mere honest demand of payment or settlement would, as has frequently been held, be sufficient. Here there was much more than that. I do not think it needful to con the numerous authorities or to discuss the foundation or reasonableness of the doctrine. I refer especially to *Stephens v. McArthur*, 19 S. C. R. 446; *Molsons Bank v. Halter*, 18 S. C. R. 88; *Long v. Hancock*, 12 S. C. R. 532; and *Slater v. Oliver*, 7 O. R. 154; in which last case I had occasion to consider the question very fully. The rule is still open to be invoked where the statute has not abolished it, as in cases coming under clause (b); and where the facts admit of its application we are bound to give the creditor the benefit of it where honest pressure has been exercised by him for the settlement of his claim. Therefore, in my opinion, we should allow the appeal and restore the judgment of the trial Judge.

A question of some importance (in the event of the appeal not being allowed altogether, as I think it should be), arises as to the form of the judgment below and the extent of the relief granted. The assignee has been declared entitled to recover the whole value of the butter obtained by Wenger in settlement of his claim. Part of the claim which had been thus satisfied consisted of a promissory note for \$1,600 made by the debtor Hannah and one Campbell (also a defendant in the action) as his surety, he having signed it for Hannah's accommodation on the settlement of Wenger's claim. This note was given up,

and is said to have been lost or destroyed. Wenger's contention is that as the surety has been released and he cannot be restored to his former position, no order can be made against him for payment to the assignee to the extent of the amount which had been secured by the note. He relies upon section 3, sub-section 3, of the Assignments and Preferences Act, which enacts that in case a payment has been made which is void under the Act and any valuable security has been given up in consideration of the payment, the creditor shall be entitled to have the security restored or its value made good to him before or as a condition of the return of the payment. The Court below have so far given effect to this contention that they have ordered execution of the judgment as to \$1,600, part of the sum of \$2,082 which Wenger was ordered to pay to the assignee, to be stayed until the defendants Hannah and Campbell return the note in question, or, in the event of its loss, lodge in Court a new note for the same amount and of the like date, tenour and effect, which they are accordingly ordered to do. The Court, nevertheless, expressly declined to determine whether Wenger had any remedy upon the original or substituted note.

The question is, what is meant by the words "valuable security" in this section—a security which had been "given up" by the creditor in consideration of the payment, and which is to be "restored" or its value "made good" to him before, or as a condition of the return of the payment? This language does not appear to me apt to confer upon the Court the power of reinstating the liability of a person who was a mere surety of the insolvent debtor, or of declaring that such person was not discharged by the impeached transaction between the creditor and the principal debtor. The action which may be brought to recover back the payment or goods received is an action by the assignee against the creditor, and is one with which the insolvent, and his surety have no concern. The condition which, in a certain event, is to be imposed is one the performance of which rests with the assignee. The security

Judgment.

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OSLER,  
J.A.



**Judgment.** to be restored or made good is one which he can restore or make good, in short, a security the property of the debtor or his estate which, or the value of which, has passed to the debtor or the assignee, or of which the debtor, and therefore presumably his other creditors, had the benefit before making the assignment. It can hardly be that the Legislature meant that the assignee should restore to the creditor with one hand what he took away with the other. The security intended, as I think, is one upon which, if the creditor were still the holder of it, he would be bound to place a value when ranking on the estate, under section 19 (4), and of a similar nature to those referred to in sub-section 4 of section 3, the value of which is in one of the cases there provided for, to be "restored," that is to say, given back to the creditor. This means, in my opinion, something which the creditor had given up to the debtor, and of which he or his estate had received the benefit. So also in another case mentioned in the sections—the substitution of one security for another for the same debt, which is permitted so far as the debtor's estate is not thereby lessened in value to the other creditors. The intention of the Act evidently is that the debtor's estate shall not be augmented both by the return of the payment avoided by the Act and the retention of the security which the creditor had given up to the debtor in consideration of the payment. It cannot have been intended to affect the position of one who was a mere surety for the debtor against whom the creditor might well be left to assert any rights which might be open to him on the avoidance of the payment, under the authority of such cases as *Pritchard v. Hitchcock*, 6 M. & G. 151, and *Petty v. Cooke*, L. R. 6 Q. B. 790.

In cases to which I think sub-section (3) is confined there is no injustice in refusing to order repayment by the creditor to the assignee without the return or making good by the latter of any security which he had from the debtor's estate and which he had given up in consideration of the payment, and this even although the creditor had

deliberately intended to obtain a preference, and had actively done what is forbidden and declared to be invalid by the Act. There can be no reason why the debtor's estate should profit by the transaction or why the creditor should be punished by the loss of his security in addition to his being compelled to repay what he had given it up for; but it is difficult to believe that the Legislature intended that a payment, which is expressly invalidated by the Act, should yet be practically irrecoverable by the assignee where the creditor has given up such a security as that in question—a security in which the estate is not interested, simply because the effect of the invalid transaction may have been to discharge the surety and to destroy the security: *Churcher v. Johnston*, 34 U. C. R. 528.

Judgment.

OSLER,  
J.A.

If, therefore, the appeal be not allowed altogether on the ground I have above mentioned, the judgment of the Court below should be varied by striking out the restriction as to execution for the \$1,600, and by discharging the defendants Hannah and Campbell from the action. They were not proper parties, and I do not see why they should not in any case have their costs.

FERGUSON, J. :—

At the time of the impeached transaction Hannah was in insolvent circumstances and unable to pay his debts in full, and it seems clear to me that Wenger knew this fact, though the trial Judge seems to have thought it possible that he did not know it.

I think the evidence sufficiently shews, even against Wenger's present statement, that he, Wenger, was at the time of the transaction—the transfer of the butter—aware of the insolvency of Hannah. Circumstances from which ordinary men of business would conclude that the debtor was unable to meet his liabilities, being known to the creditor, afford a sufficient ground for saying that he had knowledge of the insolvency: *National Bank of Australasia v. Morris*, [1892] A. C. 287. Here there is, as I think, more. There is the former partnership between Hannah and Wenger, and the reason at one time given by Wenger for the

Judgment. dissolution of the same. There is the actual knowledge of  
**FERGUSON, J.** Wenger that Hannah failed to pay or satisfy more than one of his commercial obligations as they fell due, and that some of them went to protest; and there is Wenger's written statement of the fact itself in his correspondence with an outside party, Wenger now saying that this statement in his own writing was not true. The insolvency, and that both the debtor and this creditor Wenger were aware of it at the time of the transfer of the butter, may, as I think, for all purposes here, be considered as facts fully proved.

I am unable to see clearly that it is not shewn that the impeached transaction took place on or as early as the first day of August, 1894, and more than sixty days before the assignment. That it did not take place on the other date referred to (the 16th of August), seems to be shewn by the letter of the 14th of August, as to the genuineness of which no question is raised. There is also the evidence as to what Hannah said in the warehouse as early as about a week after the first day of August in respect of some of the butter that had been sold and transferred to Wenger having been appropriated to the members of the creamery association by being placed with a lot of butter set apart for them or for their security, and other butter having been afterwards substituted for this quantity and put with Wenger's butter. Having this evidence, and there is, I think, some more, I am unable to see sufficient reason for saying that the transaction of the transfer of the butter took place on some day after the first and before the 16th day of August, and within the sixty days before the assignment by Hannah, which was on the 2nd day of October. No day other than the first day of August is fixed by or mentioned in the evidence as the day on which this transaction took place; and there are the apparently regular entries in Hannah's book, shewing that the 1st of August was the date, and the learned trial Judge does not find that this book is not genuine.

In short, I am of the opinion that what in this regard is shewn is that the transfer of the butter did take place on the first day of August and not within the sixty days

before the assignment of Hannah. It is shewn, as I think, Judgment. and as I have already said, that Hannah was on that day FERGUSON, J. insolvent, and that both he and Wenger had knowledge of this fact.

Then, according to the cases, *Johnson v. Hope*, 17 A. R. 10, and *Ashley v. Brown*, 17 A. R. 500, the transaction should—if nothing more appeared—be set aside, for such a dealing with the insolvent debtor could not be in good faith.

If, however, the evidence of Hannah and Wenger in respect to their visit to Toronto on the 27th of July, and what took place between them in respect of this transaction, is believed, and the learned trial Judge has not disbelieved it, the preference in favour of Wenger was not a voluntary one. This evidence shews that Hannah was indebted to Wenger; that Wenger had liabilities to meet which he was not in a position to meet unless Hannah would pay him; that for this reason he demanded his pay from Hannah; that Hannah being unable to pay money, Wenger proposed that Hannah should give him something, or some property on which he could obtain money to meet his own liabilities; that they then spoke of this butter, but did not agree as to the price at which it should be transferred; but they afterwards did agree on the price, and the butter was accordingly transferred as payment of the debt. This constituted and was pressure by the creditor taking the transaction out of the category of voluntary preferences: *Molsons Bank v. Halter*, 18 S. C. R. 88; *Stephens v. McArthur*, 19 S. C. R. 446; *Gibbons v. McDonald*, 20 S. C. R. 587. These cases shew that the forbidden preference is a voluntary one, and that where there is pressure the preference is not voluntary.

I am, for these reasons, of opinion that the transaction here sought to be impeached should stand, and that the appeal should be allowed with costs.

BURTON, and MACLENNAN, JJ. A., concurred in the result.

*Appeal allowed.*

R. S. C.

## SMITH V. PEARS.

*Covenant—Indemnity—Release—Sale of Land.*

A covenant by a purchaser with his vendor that he will pay the mortgage moneys and interest secured by a mortgage upon the land purchased, and will indemnify and save harmless the vendor from all loss, costs, charges and damages sustained by him by reason of any default, is a covenant of indemnity merely; and if before default the purchaser obtains a release from the only person who could in any way damnify the vendor, he has satisfied his liability.

Judgment of ROSE, J., affirmed.

**Statement.** THIS was an appeal by the plaintiff from the judgment of ROSE, J.

The plaintiff was the mortgagee of certain lands in the city of Toronto, and brought the action against the defendant, who under certain mesne conveyances, was the owner of the equity of redemption, to recover from him personally the amount due upon the mortgage.

The mortgage to the plaintiff was made on the 6th of May, 1887, by Frederick Phillips and Francis Phillips for securing payment of \$11,168.75, payable on the 6th of May, 1890, with interest at six per centum per annum.

By deed dated the 1st of May, 1888, made in pursuance of the Act respecting Short Forms of Conveyances, Francis Phillips and Frederick Phillips granted in fee simple to Edward Hunter the lands in question, the consideration being stated to be the sum of \$16,300, and the deed being subject to the mortgage to Smith. This deed was not executed by Hunter.

By deed dated the 14th of January, 1892, made in pursuance of the Act respecting Short Forms of Conveyances, Edward Hunter granted to James Hewlett, his heirs and assigns, the lands in question, the consideration being stated to be "the exchange of land, the assumption of a mortgage and \$1.00." This deed was not executed by Hewlett.

By agreement dated the 25th of April, 1892, Hewlett agreed to exchange with the defendant Pears the lands in question, subject to the mortgage to Smith, for property

belonging to the defendant Pears, also subject to a mort- Statement.  
gage, the defendant Pears to pay \$2,000 in cash in addition.  
This agreement stated that "each party hereby covenants  
to assume the encumbrances, if any, as stated herein, on  
the property conveyed to him by the other."

By deed dated the 11th of May, 1892, made in pursuance  
of the Act respecting Short Forms of Conveyances, Hew-  
lett granted to Pears, his heirs and assigns, the lands in  
question, the consideration for the deed being stated to be  
the exchange of certain lands, the assumption of the mort-  
gage to Smith and the sum of \$2,000. This deed was  
executed by Pears and contained the following covenant:  
"The said party of the third part (Pears) for himself, his  
heirs, executors, administrators and assigns, hereby cove-  
nants, promises and agrees to and with the said party of  
the first part (Hewlett) his executors and assigns, that he  
will well and truly pay the said mortgage moneys and  
interest secured by the said in part recited mortgage in  
the manner therein provided and will indemnify and save  
harmless the said party of the first part, his heirs and  
assigns, from all loss, costs, charges and damages sustained  
by him or them by reason of such default."

On the 15th of August, 1895, Hewlett assigned to the  
plaintiff all his right, title and interest in this covenant,  
together with all benefits and advantages to be derived  
therefrom and all rights of action whatsoever thereunder  
or arising therefrom.

On the 26th of February, 1896, Francis Phillips assigned  
to the defendant all the covenants and agreements entered  
into by Hunter with him in the deed of the first of May,  
1888, particularly the covenant to pay the moneys secured  
by the mortgage to Smith, and to indemnify the grantors.

On the 24th of March, 1896, Hunter assigned to the  
defendant the covenants and agreements entered into by  
Hewlett with him in the deed of the 4th of June, 1892,  
particularly the covenant to pay off, satisfy and discharge  
the mortgage to Smith and to indemnify and save harmless  
Hunter.

**Statement.** In April, 1896, Frederick Phillips assigned to the defendant all the covenants and agreements entered into by Hunter with him in the deed of the 1st of May, 1888, particularly the covenant to pay the moneys secured by the mortgage to Smith, and to indemnify the grantors.

This action was commenced on the 22nd of February, 1896, and was tried at Toronto on the 21st of September, 1896, before ROSE, J., who, on the 24th of September, 1896, gave the following judgment in favour of the defendant:—

ROSE, J. :—

The first question to be considered is, what is the nature of the covenant that Pears gave Hewlett? I think it was a covenant of indemnity. I think that the transaction between the parties must be considered, and what they intended, and that the language which they have used can be given full force and effect to by holding that the covenant would be satisfied, and the promise made therein would be performed, if Pears protected Hewlett against the mortgage. I am not at all concerned with the fact that Smith, the mortgagee, is bringing this action; it is simpler to view it as if it were an action by Hewlett. Hewlett sues Pears and claims to be indemnified against the mortgage, claims to have the covenant to pay that mortgage performed. Pears' answer, I think, is one which is good in equity, if it is not in law, as we understand law to be when the Court administered law and equity according to the rules then in force. What Pears says in substance and effect is this: "You did not owe the mortgagee at all; the mortgagee had no claim upon you; there was no debt due by you to him which you were liable to pay; the only obligation that you were under was to pay the mortgage for the purpose of protecting your immediate grantor; you had agreed to indemnify your immediate grantor, and your liability was to him; it is a matter of no consequence to you whether the mortgagee is paid or is not paid, if you are protected as against your grantor Hunter; and as far as Hunter is concerned, it is a matter

of no consequence to him whether the mortgagee is paid or not if he is protected against liability to his immediate grantor, who happens to be the mortgagor; and I have obtained an assignment of covenants from both the mortgagor and from Hunter, and I am in a position now to indemnify you and to save you harmless in respect of any liability on the covenant, and so it is not just and it is not equitable that I should be compelled to pay a liability to the mortgagee which I never, as between him and myself, assumed, and in respect of which he never had any cause of action against me."

Judgment.

ROSE, J.

The only cause of action that the plaintiff has against Pears is on this assigned covenant, and any answer that would be sufficient to Hewlett would be sufficient as against the claim made by Smith. I think that if the parties before the Court were Hewlett and Pears, and Pears shewed a state of facts such as they are here, the Court would make no order against Pears to pay this money, Hewlett being fully protected, and the liability being fully discharged by obtaining a discharge from Hunter and from Hunter's grantors, the mortgagors of the land in question.

The plaintiff appealed and the appeal was argued before BURTON, OSLER, and MACLENNAN, JJ. A., on the 25th of November, 1896.

*E. Taylour English*, and *Allan McNab*, for the appellant. The learned Judge erred in holding that the covenant sued on herein was a covenant of indemnity only. It is an absolute covenant, of which the appellant is the assignee, in consideration of the conveyance of certain lands and the payment of a certain sum of money, to, among other things, pay the mortgage in question in the manner provided therein. The ordinary rule of construction should be applied and the intention of the parties gathered from the wording of the instrument itself: *Shore v. Wilson*, 9 Cl. & F. 355; *Smith v. Lucas*, 18 Ch. D., at p. 542; *London*



**Argument.** *Fire Assurance Co. v. Kelk*, 26 Ch. D., at p. 134; *Mathew v. Blackmore*, 1 H. & N. 762.

*A. J. Russell-Snow*, and *G. H. Smith*, for the respondent. The covenant is a covenant of indemnity merely, and a release having been obtained from the only persons who could damnify Hewlett, the liability of the defendant under the covenant has been satisfied and the action was rightly dismissed: *Sutherland v. Webster*, 21 A. R. 228; *Credit-Foncier Franco-Canadian v. Lawrie*, 27 O. R. 498; *Thompson v. Warwick*, 21 A. R. 637.

*E. Taylour English*, in reply.

January 12th, 1897. The judgment of the Court was delivered by

MACLENNAN, J. A.:—

This case depends on the construction of the covenant entered into by the defendant with his vendor Hewlett. Omitting immaterial words, it is that he will pay the said mortgage moneys and interest secured by the said in part recited mortgage in the manner therein prescribed, and will indemnify and save harmless the said Hewlett, his heirs and assigns, from all loss, costs, charges and damages sustained by him or them by reason of such default.

My learned brother Rose has held that this is a mere covenant of indemnity, and that the defendant having obtained a release from the only person who could in any way damnify the covenantee or his heirs, he has thereby performed the obligation of his covenant, and that his having done so is a defence to the action. I am of opinion that his decision is right. When Hewlett sold and conveyed the land to the defendant he was not personally liable to the plaintiff the mortgagee. The Phillipses were the only persons who were so liable, and the sole object and purpose of the covenant in question was to protect Hewlett from his immediate vendor Hunter. It is true that as long as Hewlett was in danger from Hunter by reason of the non-

payment of the mortgage Hewlett could have sued the defendant on his covenant and could have recovered the mortgage money, or so much thereof as remained unpaid: *Hewburn v. Mackelcan*, 19 A. R. 729; *Lethbridge v. Mytton*, 2 B. & Ad. 772. But his recovery would be for the sole purpose of indemnity, and could be barred at any time by a release from Hunter. The following cases shew that although the covenant is expressed to be a covenant for payment, it is still nothing more than a covenant for indemnity: *Barham v. Earl of Thanet*, 3 Myl. & K. at pp. 622-4; *Barry v. Harding*, 1 J. & Lat. at p. 485, *per* Sugden, L. C. And that in such a case the person to whom the money is to be paid has no right of action either at law or in equity, is well settled: *Colyear v. Countess of Mulgrave*, 2 Keen 81. When Hewlett assigned his covenant to the plaintiff, he had no longer any interest in the land, and his sole right was to be indemnified against his obligation to Hunter. He could not assign to the plaintiff any higher or different right than he had himself. Therefore when the defendant obtained from Hunter a release of all claims against Hewlett the obligation under his covenant was fulfilled, and his liability was satisfied, and that part of the action was properly dismissed. The parties are standing on their strict rights. The plaintiff endeavoured to gain an advantage by acquiring from Hewlett an assignment of the covenant, and the defendant had an undoubted right to protect himself by satisfying his obligation by obtaining the release which he has procured from Hunter. The appeal ought, therefore, to be dismissed.

Judgment.  
MACLENNAN,  
J.A.

*Appeal dismissed.*

R. S. C.

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## JOHNSTON V. CATHOLIC MUTUAL BENEVOLENT ASSOCIATION.

*Benevolent Society—Rule Directing Payment to Named Beneficiaries—Certificate Payable to Assured's Executors—Rights of Creditors and Legatees—R. S. O. ch. 172.*

A certificate issued by a benevolent society incorporated under R. S. O. ch. 172 in favour of an unmarried man declared the sum therein mentioned to be payable to his executors. The rules of the society required the beneficiary to be named in the certificate, and in default provided for payment to certain named relations of the member, or his next of kin, or to the beneficiary fund of the society :—

*Held*, that this was not a legal appointment or declaration of the fund under the statute and rules of the society, that the fund did not pass to the member's executors under his will, and that neither creditors nor legatees could claim it, but that the case must be looked upon as one of default of appointment and the money applied as directed by the rules, MAULENNAN, J. A., dissenting.

Judgment of ROBERTSON, J., varied.

**Statement.** THIS WAS an appeal by the plaintiffs from the judgment of ROBERTSON, J.

The action was brought by the plaintiffs on behalf of themselves and all other creditors of the late Patrick O'Dea, against the Catholic Mutual Benevolent Association and William Tighe, executor of the last will of Patrick O'Dea, for a declaration that the sum of \$2,000, payable by the Association upon a benefit certificate issued to Patrick O'Dea as a member of the Association, should be distributed by the executor in due course of administration among the creditors of the deceased. The Association, under an order, paid the moneys in question into Court to abide the result of the action, which came on for trial at Toronto, on the 3rd of October, 1895, before ROBERTSON, J., who on the 31st of December, gave the following judgment :—

ROBERTSON, J. :—

This action was tried before me at the last Toronto non-jury Sittings, and is brought by the plaintiffs on behalf of themselves and all other creditors of the late Patrick O'Dea, to recover the sum of \$2,000, being the amount of a certificate or policy of insurance in "The Grand Council

of the Catholic Mutual Benefit Association of Canada," Judgment.  
issued to and in favour of the said Patrick O'Dea, who ROBERTSON,  
died on the 7th of June, 1895, a bachelor, and who was at J.  
time of his death, a member of Branch No. 35 of said  
Association, located at Goderich, in Ontario. The certifi-  
cate bears date the 31st of December, 1892, and is payable  
on the death of Patrick O'Dea to his executors.

The Association was first incorporated under R. S. O.  
ch. 172, in the year 1890. Afterwards, in 1893, the Asso-  
ciation, by their petition to the Parliament of Canada,  
represented that they were so incorporated, and were  
desirous of carrying on business in all the provinces and  
territories of the Dominion, under the control of one cen-  
tral body, and for such purpose prayed to be incorporated  
by the Parliament of Canada, wherefore that Parliament  
passed an Act declaring that certain persons in the first  
section thereof named, as being "all of them officers and  
members of the Grand Council of the Catholic Mutual  
Benefit Association of Canada, together with such persons  
as are or become members of the Association hereby incor-  
porated," were thereby constituted and declared to be a  
body corporate under the name above mentioned, for the  
following among other purposes:—

"To establish, manage, and disburse a mutual benefit  
and a reserve fund, from which, within sixty days after  
the receipt at the office of the secretary of the Association  
of satisfactory evidence of the death of a member of the  
Association who has complied with its lawful requirements,  
a sum not exceeding \$2,000 shall be paid by the Associa-  
tion to the widow, orphans, dependents, or other benefi-  
ciary whom the deceased member has designated, or to the  
legal representatives of such deceased member:" 56 Vict.  
ch. 90 (D.), sec. 1, sub-sec. (c).

The defendant contends that the certificate in question  
is not affected by this Act. It is still in force, and the  
Association have paid the amount thereof into Court to  
abide the result of this action. The plaintiffs contend  
contra.

**Judgment.****ROBERTSON,  
J.**

The Association keeps one general fund for the payment of the claims under the beneficiary certificates, and in this respect there has been no change since the original incorporation of the Association. This fund is made up by remittances from each of the branches of the Association. The certificates issued before the Dominion Act was passed, remain in force so long as the party insured complies with the rules, regulations and by-laws of the Association ; but at the option of the assured, may be given up and a new certificate issued under the latter Act, in lieu thereof. O'Dea retained his original certificate, and the Association has recognized its validity. Before his death O'Dea made his last will and testament, by which he appointed the defendant Tighe his sole executor, and probate has been duly granted to him ; and in and by such will the deceased devised and bequeathed to his said executor all his real and personal property ; and, "out of the amount which shall come into the hands of my said executor under the certificate which I hold from the Grand Council of the Catholic Mutual Benefit Association of Canada, I direct him to pay to the estate of the late Julia McGrath the sum of \$50 ; and to the Roman Catholic Episcopal Corporation of the Diocese of London, for the use of St. Peter's church in the town of Goderich, \$500, which sum shall be taken to pay off the notes now held by said corporation against me, but should the said corporation receive anything from the assignee who now holds my estate, then the sum of \$500 shall be reduced by whatever sum said corporation shall have received from such assignee.

"My said executor shall also, out of said amount which he shall receive under said beneficiary certificate, pay to whoever may be at the time of my decease parish priest of Goderich, the sum of \$200 for masses, and shall also, out of the same fund, pay to my nieces Mrs. Bridget Tighe and Mrs. McIntosh, the sum of \$500 each for their own sole and separate use.

"The balance of the proceeds of my said estate shall be paid to my grand-niece May Tighe, daughter of my said

niece Bridget Tighe, by my said executor, he having first paid my funeral and testamentary expenses."

Judgment.

ROBERTSON,  
J.

The plaintiffs contend that as the certificate designates that the amount to be paid under it is payable to the executor, the amount must be applied as far as it will go in payment of the debts of the testator.

On the contrary, the defendant contends that the amount is protected by section 11 of the Benevolent and Provident Societies Act, R. S. O. ch. 172, and that the testator having designated in his will how the amount is to be disposed of by his executor, that binds.

It was one of the rules of this Association, at the time this certificate was issued, and still is (sec. 5), that "a member may at any time, subject to the law of the province or territories in which the branch of which he is a member is located, change, alter, or amend the designation of person or persons to whom the benefit named in his policy is payable, by surrendering said policy, after having filled and signed the blank which shall be provided for that purpose, on the back of the same. The secretary of his branch shall attach his signature and the seal of his branch, and forward it to the grand secretary, who shall issue a new policy in accordance with such change of designation." And it is contended by the plaintiffs that as the testator did not literally comply with that rule, he had no power or right to change or alter the designation, etc.

In the first place I am of opinion that the original charter of the Association, granted under the R. S. O. ch. 172, is, so far as this certificate is concerned, still in force; if it is not, then I think the plaintiffs could not succeed, or, in other words, the Association need not have recognized such certificate, in which case the money would not have been paid into Court.

In the next place, I think, not without some hesitation, however, that section 11 of the above Act applies, and that the money payable under the certificate is free from all claims by the creditors of the member in whose behalf it is issued.

Judgment.

ROBERTSON,  
J.

The certificate declares that the amount is to be paid to the executor, and the testator by his will expressly and particularly declares how the executor is to dispose of it. I think this is within the scope of the Act of Ontario, as well as the Act of the Dominion, and within the terms of the constitution of the Association, although I confess to some doubt in the matter, and that doubt is created by the words of the 11th section, which says, "such money shall be, to the extent of \$2,000, free from all claims by the personal representative or creditors of the deceased." Now here the certificate designates the "personal representative" as the party to whom the amount is to be paid; but the testator has by his will declared how his personal representative shall apply the amount when received, and as the statute expressly bars the creditors, I do not see, taking into account that the Legislature has seen fit to declare that a man may, under this section, at the possible expense of his creditors, devote a portion of his estate to keep up insurance for the benefit of any person, no matter whom, my way to adjudge otherwise than I have intimated.

In *Re Lynn, Lynn v. Toronto General Trusts Co.*, 20 O. R. 475, the certificate was to pay to the devisees of the person in whose name it was issued, and if no will, then to his heirs. By his will, made after the certificate was issued, he devised his insurance to his executors for the benefit of his wife, etc. It was held under sec. 5 of R. S. O. ch. 136, that the creditors were not entitled; and in *Beam v. Beam*, 24 O. R. 189, this case was followed, and was approved in *McKibbin v. Feegan*, 21 A. R. 87. Now here the 11th section of chapter 172, expressly declares that when, under the rules of a society, money becomes payable to or for the use or benefit of a member of any society (incorporated under that Act), such money, to the extent of \$2,000, shall be free from the claims by creditors of such member. Now the person entitled to this money, according to the rules, etc., is the executor of the member; and the member having by his will declared how the executor shall stand possessed thereof, and the

trusts and uses to which it is to be applied by him, the creditors, in my judgment, have no claim.

Judgment.

ROBERTSON,  
J.

The action must, therefore, be dismissed with costs.

The plaintiffs appealed, and the appeal was argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ.A., on the 17th of September, 1896.

*J. Parkes*, for the appellants. The certificate or policy in question in this case, must be treated as issued under 56 Vict. ch. 90 (D.), and the executor of Patrick O'Dea is, therefore, entitled to receive the amount mentioned in the certificate as executor, and is bound to apply it in payment of debts. The beneficiaries named in the will have no claim on the fund. The rules of the Association provide that a beneficiary can be changed only by the surrender of the old certificate, and the issue of a new certificate, and this has not been done. Here the executor takes for the benefit of the creditors: *Holland v. Taylor*, 111 Ind. 121; *Supreme Lodge v. Schmidt*, 98 Ind. 374; *Renk v. Herrman Lodge*, 2 Demar. 409; Bacon on Benefit Societies, 2nd ed., sec. 296; Beach on Insurance, sec. 180.

*Shepley, Q. C.*, and *E. Campion*, for the respondent. Although the rules of the Association provide that a member can change a beneficiary by the surrender of an old certificate and the issue of a new one, they do not prohibit disposition by will; and, the will in this case binds: *Supreme Council v. Priest*, 46 Mich. 429. Strictly speaking the beneficiary in this case, was not changed; the will only defines the capacity in which he took, namely, as trustee for the legatees. See in addition to the statutes and cases referred to in the judgment below, *Neilson v. Trusts Corporation*, 24 O. R. 517; *Re Unitt and Prott*, 23 O. R. 78.

*J. Parkes*, in reply.

After the argument the Court directed that the legatees and next of kin of Patrick O'Dea should be added as par-



Statement. ties; and the case was mentioned again on the 2nd of December, 1896, and was submitted for judgment without further argument.

January 12th, 1897. HAGARTY, C. J. O. :—

The defendants raise no objection to their liability to pay the \$2,000, but pay it into Court to be awarded to the parties legally entitled.

If we could treat this as an ordinary life assurance, the right of creditors to be paid prior to legatees would be fairly clear. But I think we must regard it as governed by the special legislation governing the powers and rights of benevolent societies who have no power to act as ordinary underwriters.

The scope and design of the contract entered into with the deceased was to enable him to direct for whose benefit the insurance was effected.

The certificate says: "The application must also state the person or persons to whom the beneficiary (*sic*) is to be paid in case of death, and shall be accompanied by the proposition fee of \$3."

The application has not been produced, nor is it suggested that it can throw any light on the case.

It would seem that it was contemplated that any particular disposition of the sum assured should be stated and a blank is left for insertion of the objects. This blank is thus filled, "which sum shall, at his death, be paid to his executors."

A form is printed on the back to be used when a former direction as to the payment of the beneficiary fund at death is revoked and a new direction given, namely, "and that the payment be made to \_\_\_\_\_, bearing relationship to myself of \_\_\_\_\_."

This was never filled up, and so the original and only direction for payment to the executors remains.

Then we have the provision that on the death, etc., of a member, "the amount set forth in the beneficiary certifi-

cate of said deceased shall be paid to the person or persons designated therein."

Then: "When the member has failed to make a legal appointment, or for any reason his designation is imperfect or inoperative, the beneficiary fund shall be payable to the following persons in equal shares," wife and children, next to father and mother, next to brothers and sisters, etc., next of kin, etc.; if all predecease or are non-existent, then to the beneficiary fund of the Association.

The deceased never named any beneficiary as he might have done, and have revoked and appointed another.

He, in effect, treats it as a benefit to his estate, giving it to an executor, if he chose to appoint one, leaving it as the law would leave it in the case of an ordinary life assurance.

I feel much difficulty in holding that his executor can, under the wording of the certificate, be regarded as a beneficiary appointed or named as required by the certificate.

The language of the 11th section of R. S. O. ch. 172 is very strong.

It provides that when money becomes payable to the use or benefit of a member, then such money is to be free from creditors' claims; and when on the death of a member any money becomes payable under the rules, it is to be paid to the persons entitled under the rules, or shall be applied by the society as provided by such rules, and such money, to \$2,000, shall be free from all claims by the personal representative or creditors of the deceased.

It is hard to get over this language if we hold the executor to be the beneficiary appointed under the contract.

In its words, Has the member made a legal appointment, or has his designation or appointment been imperfect or inoperative?

I think I must hold that he has failed so to do.

The statute is dealing with benefit society insurance, and creates this protection from creditors for all moneys payable to the member during life or on his death.

By the contract with the deceased, he was bound to designate who should be the beneficiaries, as they are called, and his omission so to do is provided for therein.

Judgment.

HAGARTY,  
C.J.O.

**Judgment.**

**HAGARTY,**  
**C.J.O.**

I see no alternative. The persons to be benefited are not named or designated by him, and the clause must take effect as agreed on in the contract, or we must hold that this was an insurance of a general character—the proceeds to form part of the general estate of the deceased.

I, therefore, hold that there must be a reference to ascertain the parties, if any, entitled under the clause in the contract.

**BURTON, J. A.:—**

I question much whether any action could have been maintained against these defendants to recover the amount of the certificate issued to the deceased by the Association, which was incorporated in Ontario under the general laws there in force in 1892, respecting benevolent, provident, and other societies.

The defendants, however, very properly raised no such question, but paid the amount of the claim into Court, and although I agree that the suit of these plaintiffs is not properly constituted, it may now be regarded more in the nature of an interpleader proceeding between the plaintiffs as representing the creditors and the legatees named in the testator's will, and the question is substantially whether the money intended to be payable under that certificate is payable to the legatees and is free from the claims of creditors under section 11 of the Ontario Act.

The Dominion Act is one very difficult of construction. It recites a petition from the Ontario Corporation setting forth that they are desirous of carrying on business in all the provinces and territories of the Dominion under the control of one central body, and for such purpose have prayed to be incorporated by the Parliament of Canada, and then proceeds to incorporate certain members of the Ontario Corporation, of whom the deceased was not one, under a similar name to that used by the other corporation.

In the original charter the objects of the Association are not very clearly defined, but are left to be defined by the articles of association and by the rules and regulations of the society. The Dominion Act defines with more precision the objects of the association thereby to be incorporated, and in some respects enlarges whilst in other respects it restricts the powers of the association.

Judgment.

BURTON,  
J.A.

We are not concerned at present with the rights of members who have become such since the passing of the Dominion Statute. The rights of O'Dea, or those claiming under him, arise under the Provincial Act, and that Act securing to the members peculiar privileges, infringing to a great extent upon the rights of creditors, must, I think, be strictly construed.

The rules require that a member of the class designated in the statute must, in order to be entitled to the benefit of the provision, be designated in the certificate, and if it should be desired to make any change the member must surrender the certificate and designate the new beneficiary, whose name must be inserted in a new certificate. It is clear, therefore, that beneficiaries named in a will only could not claim.

The certificate in the present case was issued to the deceased under the original charter on the 31st of December, 1892, and confirmed on the 16th of January, 1893, declaring that he was entitled to participate in the beneficiary fund of the Association to the amount of \$2,000, which sum shall at his death be paid to his executors, and things remained in that position until his death, no fresh certificate in favour of any specified persons having issued.

The Ontario Statute does not define the nature of the contracts which the societies may make and leaves them to be made and regulated by the rules to be made from time to time.

The declaration of incorporation supplies what is wanting in the general Act and shews the object to be to create and disburse a fund for the aid and relief of members and families of members of the society.

Judgment.  
BURTON,  
J.A.

I agree with my brother Osler, and for the reasons given in his judgment, that the appointment made in the certificate is an invalid appointment, and the question is, what is the effect of such an appointment, and in order to ascertain this we have of necessity to resort to the rules.

We there find that when a member has failed to make a legal appointment, or for any reason his designation is imperfect or inoperative, then the fund shall be payable to the following persons—naming members of his family—and if all such persons have predeceased him, then to the next of kin in the proportions fixed by law, and if no such next of kin the sum is to revert to the fund.

I was at first inclined to think that the member had thrown away the protection of which he could have availed himself under the statute and had intended that the amount receivable should be treated as part of his general estate and divisible in the usual course of administration, but further reflection has convinced me that whatever may have been his intention, that was not the contract which the Association entered into with him, and that he had no power to divert this money to his creditors to the exclusion of the members of his family or the next of kin, or from the fund itself in case of failure of next of kin.

The Legislature has thought proper to make this provision for a man's family, and to the extent named to exclude creditors from all claim upon the fund created by the subscription of parties who elect to become members of societies formed in the manner provided by the Act, so that if the member had named a particular member of his family as the beneficiary, and failing him and any next of kin, had expressly directed that the money should be for the payment of debts, such provision would be inoperative and void, as in failure of next of kin the money would revert to the fund, and it would not be his to dispose of.

Forfeitures, such as would occur in the present case should there prove to be no next of kin, are properly to be regarded as part of the fund on which the society relies for payment to the parties becoming entitled to benefits, and

we may fairly assume that in the actuarial calculations for determining the premiums payable by members such accretions were taken into account. It may well be that if, after entering into such a scheme as is provided for under the articles incorporating this company, a member could divert the sum—otherwise payable to a particular relative, and in the event of his death, to the fund—to the payment of his debts, the whole scheme might prove to be a delusion and a snare.

Judgment.  
BUTTON,  
J.A.

Whilst on the one hand the Legislature, for the praiseworthy object of encouraging thrift and making provision for the relief of poor relatives, has thought proper to protect the fund they created from the claims of creditors to a limited amount, it requires that the provisions of the Act should be rigidly adhered to. To hold the executor to be entitled as a beneficiary would to my mind be contrary to the spirit of the enactment and would be found very shortly to be subversive of the financial scheme on which the Association has assumed its liabilities and lead to failure.

I think that the judgment should be varied by declaring the legatees not entitled; an enquiry as to next of kin; and if not contrary to the practice I should think an order for distribution among them according to law, or in default of any next of kin, a repayment to the defendants of the fund in Court.

The appeal in other respects should be dismissed.

OSLER, J. A. :—

I think that the rights of all parties fall to be determined under the law governing the original corporation by which the beneficiary certificate now in question was issued, and under the rules of that body, which are made part of the contract evidenced by the certificate. The deceased was not a member of the corporation constituted by the Dominion Act, 56 Vict. ch. 90 (D.), in which Act there is no provision affecting the terms of the contracts or certifi-

**Judgment.**

**OSLER,  
J.A.**

cates which had been issued by the old corporation. Nor are we concerned with the question whether the certificate is a contract of insurance within the Ontario Insurance Act or the Act to secure to wives and children the benefit of life insurance. The deceased was a bachelor, and the Act which governs the case is the Benevolent and Provident Societies Act, R. S. O. ch. 172, under which the certificate was issued by the society, the now defendants, incorporated under that Act. One of the objects of their incorporation as set forth in the declaration of the corporators is, "to create and disburse a fund for the aid and relief of members and families of members of the society."

The 11th section seems the only one which need be noticed.

It enacts that when, under the rules of the society, money becomes payable to or for the use or benefit of a member thereof, such money shall be free from all claims by creditors of such member; "and when, on the death of a member of a society, any sum of money becomes payable under the rules of the society, the same shall be paid \* \* to the person or persons entitled under the rules thereof, or shall be applied by the society as may be provided by such rules; and such money shall be, to the extent of \$2,000, free from all claims by the personal representative or creditors of the deceased."

Then by the terms of the society's contract with the deceased, as evidenced by the rules or articles incorporated therewith, (a) "the amount as set forth in the beneficiary certificate, shall be paid to the person or persons designated therein. No time of absence or disappearance of a member, without proof of actual death, shall entitle his beneficiary, family, or next of kin, to receive any part or portion of the said fund."

(b) "When a member has failed to make a legal appointment, or for any reason his designation is imperfect or inoperative, then the beneficiary fund shall be payable to the following persons in equal shares: first, to his wife and to his children; next, to his father and mother; next, to his

brothers and sisters ; and if all such persons shall have predeceased the member, then to the next of kin in the proportions fixed by and in accordance with the laws of the Province in which the branch in which the deceased at the time of his death was a member, was located."

Judgment.

OSLER,  
J.A.

(c) "If no person or persons be entitled to receive such beneficiary (*sic*) by the laws of this Association the same shall revert to the beneficiary fund thereof."

By the terms of the certificate in question the amount for which the deceased was entitled to participate in the beneficiary fund of the Association, viz., \$2,000, was, at his death, to be paid "to his executors." He has by his will bequeathed the amount among various legatees named therein, and the contest is between these legatees, who have now been duly made parties to the action, on the one hand, and the creditors as represented by the plaintiffs on the other, the latter contending that as the executor is the only beneficiary named in the certificate, the amount must be applied by him in the ordinary course of administration ; and, therefore, in payment of the debts of the deceased so far as the fund will extend.

I have no difficulty in holding that in such a case as this the member cannot appoint the beneficiary by his will, because by the Act the money is to be paid to the person entitled under the rules thereof, and by the rules the person so entitled to be paid is the person designated in the certificate. Therefore *quod* beneficiaries the legatees must fail, because they are not persons so designated. There seems no escape from that conclusion. The form endorsed upon the certificate shews that if the member wishes to make any change in the beneficiary, he must surrender the certificate and designate the new beneficiary in the instrument of surrender and revocation.

The legatees or some of them may, however, as next of kin of the deceased member, maintain their claim to the fund if the appointment of the executor as beneficiary is not a legal or valid appointment, or is for any reason imperfect or inoperative.



**Judgment.**

**OSLER,  
J.A.**

Where no legal appointment has been made, or where the designation is imperfect or inoperative, as for example, perhaps, in consequence of the death of the appointee in the lifetime of the member, the fund does not form part of the latter's estate by becoming assets for payment of his debts or subject to disposition by his will. It must be disposed of in accordance with the rule of the Association above set forth, with an ultimate reversion in default of claimants as there defined, to the general beneficiary fund of the Association itself.

Can then the executor take as beneficiary so that creditors and legatees of the deceased member may treat the fund as assets in his hands for payment of debts and legacies? Having regard to the objects of associations of this kind as ascertainable from the second and eleventh sections of the general Act, and the constitution of this particular society as above set forth, the inclination of my opinion is that it was never intended that the beneficiary fund to which a member might be entitled on his death should become part of his general assets or estate, subject to payment of debts and legacies, and disposable by his will, which would in effect be the case if his "executor" or "estate" (for he might as easily and as effectually have named the one as the other), were capable of being the beneficiary.

The express declaration that the money shall be free from all claims by the personal representative or creditors of the deceased is strong to shew that neither was intended to have any claim, and that neither could, therefore, be appointed beneficiary. Such an appointment seems inconsistent with this provision of the Act, the object of which I take to have been to provide for the family and relatives of the deceased, and not for his creditors. It may be conceded that the provisions to which I have referred do not, by their terms, quite so clearly exclude others than relatives as beneficiaries as do the statutes and rules of some other associations which have been considered in such cases as *Morgan v. Hunt*, 26 O. R. 568; *Daniels v.*

*Pratt*, 143 Mass. 216; but I think that their effect is what I have stated. I am, therefore, of opinion that the judgment of the learned trial Judge must be reversed; that there should be a declaration that the next of kin of the deceased are entitled to the whole fund to the exclusion of the defendant the executor and the plaintiffs, and that there should be a reference to ascertain the persons who are the next of kin.

Judgment.

OSLER,  
J.A.

MACLENNAN, J. A. :—

The plaintiffs sue on behalf of themselves and other creditors of Patrick O'Dea deceased, and the action is against the defendant Tighe as O'Dea's executor. Its object is to obtain payment of the debts due to the plaintiffs and other creditors. The Catholic Mutual Association is made a defendant on the ground that there is a sum of \$2,000 due from them to O'Dea's estate, on a benefit certificate issued by them to and held by O'Dea at the time of his death. Such a constitution of an action as to parties is irregular, for a creditor has no right to bring any action directly against the debtors of his debtor's estate. The Association, however, have paid the money into Court and have received their costs; and the action, therefore, is now between the plaintiffs and the executor of their debtor. The question which has been decided between them, is the right of the creditors to be paid out of the fund in Court, in preference to the legacies given out of it by the debtor in his will. The learned Judge decided against the claims of the creditors and dismissed the action. The question is really not one between the plaintiffs and the executor, but between the plaintiffs and the legatees; we directed the legatees to be made parties, which has been done, and counsel on their behalf have adopted the argument made by counsel for the executor.

The question arises upon the Benevolent Societies Act, R. S. O. ch. 172, under which the Association was incorporated in the year 1890. The purposes of the Association,

**Judgment.** as set out in their declaration, are, so far as material to this action : "To aid and assist members and their families in case of death, and to create, hold, manage, and disburse a fund or funds for the purposes aforesaid, and for the payment of all claims, losses, and expenses incident to the society, and for the aid and relief of members and families of members of the society, or of any branches under the jurisdiction thereof; or any other society or branches which may be affiliated, united, or associated." The testator O'Dea became a member of the Association, and a certificate of membership was issued to him, on the 16th of January, 1893, declaring that he was entitled to "participate in the beneficiary fund of the Association to the amount of \$2,000, which sum shall, at his death, be paid to his executors." The certificate also declared that "all articles and sections contained and set forth in Schedule A. on the back hereof, and all terms, conditions, and stipulations comprised in the said articles and sections and the statement contained in the application, \* \* shall, so far as material to this contract, be deemed to be incorporated herewith." Among the articles of Schedule A. endorsed on the certificate, are the following : "On or before sixty days after due notice and proof of death of a member in good standing shall have been received, the amount as set forth in the beneficiary certificate of said deceased shall be paid to the person or persons designated therein." "When a member has failed to make a legal appointment, or for any reason his designation is imperfect or inoperative, then the beneficiary fund shall be payable to the following persons in equal shares : first, to his wife and to his children ; next to his father and mother ; next to his brothers and sisters ; and if such parties have all predeceased the member, then to the next of kin of the deceased in the proportions fixed by and in accordance with the laws of the Province in which the branch in which the deceased at the time of his death was a member, was located. If no person or persons be entitled to receive such beneficiary by the laws of this Association, the same shall revert to the beneficiary fund thereof."

**MACLENNAN,**  
**J.A.**

The certificate also declares that it is issued upon the express condition that the said Patrick O'Dea shall in every particular material to the contract while a member of the Association comply with all the laws, rules, and requirements thereof.

Judgment.  
MACLENNAN,  
 J.A.

One of the laws of the Association is called the beneficiary fund law, section 5 of which is as follows: "A member may at any time, subject to the law of the Province or territories in which the branch of which he is a member is located, change, alter, or amend the designation of person or persons to whom the benefit named in his policy is payable, by surrendering said policy after having filled and signed the blank which shall be provided for that purpose on the back of the same. The secretary of his branch shall attach his signature and the seal of his branch, and forward it to the grand secretary, who shall issue a new policy in accordance with such change of designation."

Soon after the issue of this beneficiary certificate, the Association procured from the Dominion Parliament an Act, passed on the 1st of April, 1893, 56 Vict. ch. 90, incorporating certain persons by the same name as the original Association for certain purposes, and among others, the following: section 1 (c), to establish a fund from which "a sum not exceeding \$2,000 shall be paid by the Association to the widow, orphans, dependents, or other beneficiary whom the deceased member has designated, or to the legal representatives of such deceased member."

The intention of this Act was of course to re-incorporate the original Association; but what was done was to incorporate certain named persons; leaving room for the contention that the old and the new Association are not identical, but two separate and distinct corporations. I do not think it makes any difference whether there are two corporations or only one. In my view of the case the result is the same, however that may be. The object and power of the original corporation was to form and manage a fund for the benefit of "members and their

**Judgment.** families." The new Act goes further and authorizes a fund, not only for widows, orphans, dependents, or other beneficiary designated by the member, but also his legal representatives. O'Dea died a bachelor, and had never been married, which probably accounts for the benefit being made payable to his executors. He never changed the designation of the persons to whom the benefit named in his policy was payable by surrendering the policy and obtaining the issue of a new policy as provided in section 5 of the beneficiary fund law; but by a will, made shortly before his death, he bequeathed to the defendant Tighe as executor, the sum payable under his certificate, with a direction to pay it in certain proportions to certain of his relatives, and to the church and priest of St. Peter's church in the town of Goderich. His estate is insolvent, and the legatees claim the beneficiary fund to the exclusion of the plaintiffs and the other creditors of the testator, relying upon section 11 of the Benevolent Societies Act, R. S. O. ch. 172.

**MACLENNAN,**  
**J.A.**

The first difficulty in the way of the legatees is, that they are not within the class of objects intended to be benefited by the charter of incorporation. It is the "members and the families of members" only who are intended to be benefited.

It was, perhaps, not intended that the class should be so limited, because one of the articles in Schedule A. endorsed upon the present certificate, which is above set forth, contemplates payment to father and mother, brothers and sisters, and the other next of kin of the member. I do not see, however, that we are authorized by that circumstance to enlarge the ordinary meaning of the word "family," as used in the charter, so as to include collateral relatives or strangers: *In re Terry's Will*, 19 Beav. 580; *Pigg v. Clarke*, 3 Ch. D. at p. 674.

The Dominion Act enlarges the class so as to include widows, orphans, dependents, or other beneficiary, but it also expressly includes the legal representatives of the deceased.

The Dominion Act, however, does not assume to protect the benefit from the claims of creditors; and I think the protection afforded by the provincial Act cannot be extended to objects not within the terms of the provincial charter. I therefore think that inasmuch as the defendants' charter was not intended to benefit others than the members and their families, none but members and their families can claim the protection of the statute so as to exclude the claims of creditors.

O'Dea is not shewn to have had a family in any sense, either when the certificate was issued or at the time of his death. He was himself, therefore, according to the terms of the charter, the only possible beneficiary. The benefit was accordingly made payable to his executors, in the same way as any other policy of life insurance payable at death. At his death it became part of his estate, distributable among creditors and legatees in a due course of administration.

But I also think that even if the charter was wide enough to admit the present legatees as beneficiaries, the testator could not change the beneficiary named in the certificate by will. The only legal way of doing that is, I think, by compliance with section 5 of the beneficiary fund law, by the surrender of the certificate and the issue of a new one. It has been so decided under a similar law by the Supreme Court of the State of New York: *Thomas v. Thomas*, 67 N. Y. S. C. R. 382; and also in the Supreme Court of Indiana: *Holland v. Taylor*, 111 Ind. 121, and I agree with those decisions.

The question remains whether the protection of the statute applies in the simple case of a beneficiary dying with a certificate making the benefit payable to his executors. The clause says that: "When, on the death of a member of a society, any sum of money becomes payable under the rules of the society, the same shall be paid by the treasurer or other officer of the society to the person or persons entitled under the rules thereof, or shall be applied by the society as may be provided by such rules;

Judgment.  
MACLENNAN,  
J.A.

Judgment. and such money shall be, to the extent of \$2,000, free  
MACLENNAN, from all claims by the personal representative or credi-  
J.A. tors of the deceased." Suppose then the beneficiary dies  
intestate, owing debts, and without sufficient assets to pay  
them, are the creditors excluded? I think not. What is  
said is that the money shall be free from all claims by the  
personal representative or creditors; that shews that what  
is being provided for is the case of a beneficiary other than  
the executor or administrator, as for example, a son or  
daughter. In such a case, both the personal representative  
and the creditors are excluded. But if the personal repre-  
sentative himself is expressed to be the beneficiary, as in  
the present case, it could not be intended that he should  
be excluded, for that would be to leave the money in the  
hands of the Association; for there would then be no legal  
claimant at all. The family could not claim as beneficiar-  
ies, for they were not named as such in the certificate; nor  
could they claim through the executor or administrator,  
for he is excluded from all claim by the Act. Therefore, I  
think when the executor or administrator is named as a  
beneficiary, he takes in his character of executor or admin-  
istrator, and that the fund in his hands is then to be dis-  
tributed according to law. The whole effect of the statute  
and the certificate is, in that case, exhausted when the  
money comes to the hands of the executor. Of course all  
this is confined to the case of the benefit being expressed  
in the certificate to be payable to the executor or adminis-  
trator *simpliciter* and not in trust for some lawful bene-  
ficiary. In such a case the protection would be opera-  
tive.

I therefore think that the fund is distributable in a due  
course of administration.

I think that the appeal should be allowed; that the fund  
in Court should be transferred to the credit of the estate of  
the testator, and that there should be an order for admin-  
istration.

There should also be a declaration that the legatees are  
not entitled to these legacies out of the fund free from the

estator's debts. I think that the plaintiffs should have the costs of this appeal, but the costs below of both parties, to the hearing, should be paid out of the estate. Subsequent costs to be disposed of by the Master according to the ordinary practice.

Judgment.  
MACLENNAN,  
J.A.

*Appeal dismissed, MACLENNAN, J. A., dissenting.*

R. S. C.

### NOVERRE V. CITY OF TORONTO.

*Municipal Corporations—Negligence—Way—Invitation—Land Adjoining Highway.*

THIS was an appeal by the plaintiff from the judgment of FERGUSON, J., reported 27 O. R. 651, and was argued before BURTON, OSLER, and MACLENNAN, JJ. A., on the 29th of January, 1897.

Statement.

*Laidlaw, Q. C., and J. Bicknell, for the appellant.*

*Fullerton, Q. C., and W. C. Chisholm, for the respondents.*

March 2nd, 1897. The appeal was dismissed with costs, the Court agreeing with the judgment below.

R. S. C.



**HARNWELL V. PARRY SOUND LUMBER COMPANY.**

*Master and Servant—Contract for Defined Term—Continuance of Employment—Right to Dismiss.*

Where a book-keeper is engaged for the term of one year, and his employment is continued after the expiration of that time there is no presumption that it is to continue for another year absolutely. The employer may dismiss him at any time upon reasonable notice, and where there is no evidence of usage to the contrary, three months' notice is reasonable.

Judgment of MEREDITH, C.J., reversed.

**Statement.** THIS was an appeal by the defendants from the judgment of MEREDITH, C. J.

The action was brought to recover \$240.38 damages for wrongful dismissal. The plaintiff on the 8th of May, 1893, was engaged by the defendants, an incorporated company carrying on business at Parry Sound, as assistant book-keeper for one year from the 1st of May, 1893, at a salary of \$600 a year. He at that time was engaged as book-keeper in a factory at Ingersoll at a lower salary, payable weekly, the engagement being terminable on a week's notice, and he incurred considerable expense in going with himself and his family to Parry Sound. He remained in the employment of the defendants until the 14th of September, 1894, when they gave him three months' notice of dismissal. After the expiration of the first year's employment nothing was said as to his continuing in the employment of the defendants, but they accepted his services and paid him salary at the same rate. It was not shewn how the salary was paid. The plaintiff contended that the defendants having continued to employ him after the first year were bound to employ him for another year.

The action was tried at London on the 13th of January, 1896, before MEREDITH, C. J., who, on the 29th of February, 1896, gave the following judgment in the plaintiff's favour :

MEREDITH, C. J. :—

Judgment.

MEREDITH,  
C.J.

The plaintiff was employed by the defendants to act as assistant book-keeper in their office for one year from May 1st, 1893, at a salary of \$600 per annum. After the close of that year he continued in the service of the defendants in the same capacity, being paid at the same rate, but without any express agreement as to the terms of his engagement being come to. On September 14th, 1894, the defendants gave the plaintiff notice in writing of their intention to put an end to the contract of hiring, after the expiration of three months, and on December 14th, 1894, discharged him, the three months having then expired.

The same questions which were discussed in *Bain v. Anderson*, 27 O. R. 369, were raised in this case, and the opinion I gave in delivering the judgment in that case disposed of all the questions raised in this one except one; that of the right of the defendants to put an end to the contract during the currency of the second year of the plaintiff's employment by the notice which they gave for that purpose.

From the best consideration that I have been able to give to the numerous authorities and dicta bearing upon that question, I have come to the conclusion that what the contract between the plaintiff and the defendants was is a question of fact to be determined, having regard to all the circumstances of the case, and that involves a finding as to whether the plaintiff's engagement was defeasible on reasonable notice, and if so, whether the notice given was a reasonable one.

The earlier cases seem to shew that where the hiring is indefinite as to the duration of it, and unless there are circumstances to rebut that presumption, it is presumed to be for a year, and is not determinable during the year by notice on either side unless indeed there be some custom or practice, in the particular trade or business to which the employment relates, by which it is subject to be so determined.

**Judgment.****MEREDITH,  
C.J.**

Among the numerous authorities which appear to support that proposition I may refer to *Rex v. Yarmouth*, [1816] 5 M. & S., at p. 116; *Huttman v. Boulnois*, [1826] 2 C. & P. 510; *Beeston v. Collyer*, [1827] 4 Bing. 309; *Turner v. Robinson*, [1833] 5 B. & Ad. 789; *Fawcett v. Cash*, [1834] 5 B. & Ad. 904; *Williams v. Byrne*, [1837] 7 A. & E. 177; *Lilley v. Elwin*, [1848] 11 Q. B. 742; *Metzner v. Bolton*, [1854] 9 Exch. 518; *Foxall v. International Land Credit Co.*, [1867] 16 L. T. N. S. 637.

The language used by the Judges in these cases would appear to indicate that they treated the presumption as one of law, but the reason for this is probably explained by Chief Justice Deuman, in *Williams v. Byrne*, where he points out that the nature of the contract is always a matter of fact, though in some instances the nature of the contract is in fact so well understood that it is often put as a matter of law : p. 182.

That it is a matter of fact, and that at all events with regard to many kinds of employment there is no inflexible rule that an indefinite hiring is a hiring for a year was said by Chief Baron Pollock in *Fairman v. Oakford*, [1860] 5 H. & N. 635, and was decided in *Green v. Wright*, 1 C. P. D. 591. See also *Baxter v. Nurse*, [1844] 6 M. & G. 935; *Hiscox v. Batchellor*, [1867] 15 L. T. N. S. 543; *Vibert v. Eastern Telegraph Co.*, [1883] 1 Cab. & E. 17; *Lowe v. Walter*, [1892] 8 Times L. R. 358; Taylor on Evidence, 9th ed., sec. 177, and I take the law now to be as stated by Mr. Taylor, and laid down in the cases to which he refers and those which I have mentioned.

I have then to determine as a question of fact what in this case was the nature of the contract between the parties. Was it a hiring for a year not subject to be determined by notice within the year, or was it a hiring for an indefinite term which might be put an end to by either of the parties, at any time, on reasonable notice?

Upon the whole, looking at the nature of the employment, the term of the original engagement, the circumstance that the plaintiff gave up another situation which

he then filled to enter the service of the defendants, as well as the other circumstances of the case, I have come to the conclusion that the proper inference of fact to be drawn by me is that after the termination of the first year's service the contract of hiring was for another year not subject to be put an end to by either party to it during the year, and I so find.

There will, therefore, be judgment for the plaintiff for \$240.38 (the amount which it was admitted he is entitled to, if entitled to recover at all), with full costs of suit.

The defendants appealed, and the appeal was argued before BURTON, OSLER, and MACLENNAN, JJ. A., on the 25th of September, 1896.

*Osler, Q. C., and W. M. Douglas*, for the appellants. The learned Chief Justice was in error in holding that there was an implied contract of hiring for a second year from the termination of the first year's service. The reasons assigned in support of that finding, namely, that the plaintiff gave up another situation, and that the original engagement was for a year did not justify the inference drawn. The hiring was either a monthly hiring, or at most a general hiring subject to termination upon reasonable notice, and the notice given in this case was reasonable: *Lowe v. Walter*, 8 Times L. R. 358; *Vibert v. Eastern Telegraph Co.*, 1 Cab. & E. 17; *Baxter v. Nurse*, 6 M. & G. 935; *Fairman v. Oakford*, 5 H. & N. 635; *Creen v. Wright*, 1 C. P. D. 591; *Hiscox v. Batchellor*, 15 L. T. N. S. 543; *Foxhall v. International Land Credit Co.*, 16 L. T. N. S. 637. An executory contract of the kind here in question cannot be implied as against a corporation: *Hughes v. Canada Permanent L. & S. Society*, 39 U. C. R. 221; *Austin v. Guardians of Bethnal Green*, L. R. 9 C. P. 92; *Finlay v. Bristol and Exeter R. W. Co.*, 7 Exch. 409.

*W. K. Cameron*, for the respondent. The learned Chief Justice was justified in holding that the conditions of the original hiring applied to the subsequent service, and that

Judgment.

MEREDITH,  
C.J.

**Argument.** there was a contract for at least a second year not subject to be terminated by notice: *Forgan v. Burke*, 12 Ir. C. L. 495; *Bain v. Anderson*, 27 O. R. 369; *Beeston v. Collyer*, 4 Bing. 309; *Fawcett v. Cash*, 5 B. & Ad. 904; *Williams v. Byrne*, 7 A. & E. 177; *Lilley v. Elwin*, 11 Q. B. 742. There is no evidence that the plaintiff was paid monthly either before or after the expiration of the first year, and it cannot be inferred that the hiring was a monthly one. Even if the hiring is held not to be a hiring for a year the notice given was not a reasonable one. A contract of this kind is a usual and necessary one in the conduct of the business of a trading corporation, and need not be made by by-law: *South of Ireland Colliery Co. v. Waddle*, L. R. 3 C. P. 463; L. R. 4 C. P. 617; *Ontario Western Lumber Co. v. Citizens' Telephone and Electric Co.*, 32 C. L. J. 237; *McEdwards v. Ogilvie Milling Co.*, 4 Man. R. 1; Pollock's Law of Contracts, 5th ed., p. 145.

*Osler*, Q. C., in reply.

January 12th, 1897. The judgment of the Court was delivered by

OSLER, J. A. :—

The case was that the plaintiff entered into the defendants' service as assistant book-keeper under a written agreement, proved by letters which passed between himself and the president of the defendant company, for one year certain, from the 1st of May, 1893, to the 1st of May, 1894, at a salary of \$600; that after the expiration of the year, nothing having been said on the subject, he continued in the defendants' employment until the 14th September, 1894, when they gave him a three months' notice of dismissal, not requiring his services for the ensuing winter. There was no evidence expressly shewing how the salary had been paid for the first year, but it was paid during the second year at the same rate, though whether monthly or in what manner did not clearly appear. Pro-

bably from the last receipt, which is for a small sum, it may be inferred that it was paid in unequal amounts. It was proved that the plaintiff had left a situation as book-keeper in a factory at Ingersoll at a lower salary payable weekly, and terminable on a week's notice, to enter the defendants' service, and that he had incurred considerable expense in moving his family from Ingersoll to Parry Sound, a distance of several hundred miles. The question to be determined is, what was the nature of the contract between the parties? The learned Chief Justice has held that it was a definite hiring for another year, not subject to be determined by notice during the year.

Judgment.

OSLER,  
J.A.

The multitude and diversity of the decisions on this subject make it a most embarrassing one to deal with. The earlier cases laid down the simple rule that if a master hired a servant without mentioning the time, that was a general hiring, and in point of law a hiring for a year. That was laid down in *Fawcett v. Cash*, 5 B. & Ad. 904, and *Turner v. Robinson*, 5 B. & Ad. 789, which may be taken as illustrations of the language used in a large class of cases. This presumption it was said might be repelled or controlled by evidence of custom or usage, but in the absence of such evidence the general rule would prevail. Probably the origin of the rule may be found, as Mr. Macdonell suggests in his book on the Law of Master and Servant, p. 167, in the old Statutes of Labour, long in force, that hirings should be by the year: 5 Eliz. ch. 4, sec. 3. And in *Fitzherbert Nat. Br.* 168; *Co. Litt.* 42 (b), it is said: "And if a man retain one to serve him, and express not for how long he shall serve him, he shall serve him for a year, for that retainer is according to the statute," i.e., the statute 23 Ed. III. ch. 1.

In the settlement cases arising under the administration of the poor laws it is repeatedly laid down, in favour of settlement, that "the general rule is that an indefinite hiring, without any circumstances to shew that a less time was meant, shall be considered as a hiring for a year": *per Ashurst, J.*, in *Rex v. Seaton*, cited in Burn's Justice of the

Judgment.

OSLER,  
J.A.

Peace, vol. 4, p. 395 (30th ed., 1869); and at p. 394 of the same volume, section (d), it is said, under the heading, "Where the contract is indefinite—Where the relation of master and servant has existed in such a manner that a hiring for a year *may* have been entered into between them, the law will adopt such an inference unless it can be rebutted by opposing evidence. The stipulations, therefore, as to *time* or *wages* may justify the conclusion of a yearly hiring, although they do not *expressly* include that period."

In the settlement cases the question whether there had been a hiring for a year was said to have been in most cases a question of fact for the sessions to determine: *Rex v. Bottesford*, 4 B. & C. 84. And so I think it was as a general rule held to be in other cases whenever the point was expressly raised. It was said to be for the jury to determine upon the whole of the circumstances of the case, though they were told that the presumption existed and ought to govern in the absence of anything to repel or control it.

In many of the modern cases, however, the question seems to be dealt with from a different point of view. I agree with the learned Chief Justice in thinking that the weight of authority is in favour of treating it as one of fact. But the nature of the presumption and the circumstances under which it is to be raised or applied are more fully considered on principle in such cases as the following. *Baxter v. Nurse*, 6 M. & G. 935, is one of the principal cases. There the plaintiff had been engaged as the editor of a review about to be published in the following year. The terms on which he was engaged were not proved either as to period of service or amount of salary. It was shewn that after the commencement of the publication he had been paid three guineas as a week's salary. It was contended that the jury should have been told as upon a general rule of law, that the hiring must be taken to have been by the year. Tindal, C. J., said: "It appears to me that the principle on which contracts of this nature, which have

been entered into without any definite arrangement as to time, are held to be contracts for a year, is by no means an inflexible rule, but that it is a presumption to be raised from contracts of the same kind; and that the judge at a trial is not authorized to lay down any general rule upon the subject. \* \* In cases where a general rule with regard to questions of hiring has been established, it has been in conformity with some established usage to be gathered from evidence. That it is not a fixed rule is clearly shewn from the course taken at trials where the question as to the nature of a hiring arises—where evidence is always given by persons in the particular trade, or under circumstances similar to those of the parties in the case; and then the jury are told that unless there is something to distinguish the case before them from the usage that has been proved, the parties must be considered as dealing with reference to such usage. But the finding by the jury in such a case, in conformity with such general usage, cannot be considered as a rule of law."

Judgment.

OSLER,  
J.A.

In *Williams v. Byrne*, 7 A. & E., at p. 182, Lord Denman said: "In some instances the nature of the contract is, in fact, so well understood that it is often put as matter of law. Still it is always a matter of fact."

In *Fairman v. Oakford*, 5 H. & N. 635 (shipbroker's clerk), Pollock, C.B., said: "There is no inflexible rule that a general hiring is a hiring for a year. Each particular case must depend upon its own circumstances." That case was expressly approved in *Green v. Wright*, 1 C. P. D. 591 (master of a ship), where the agreement was: "I hereby accept the command of the ship 'City Camp' on the following terms: Salary to be at the rate of £180 sterling per annum." Then followed other terms not material to be noticed. The Court said: "The relation of the master of a ship to his employer, the ship owner, is not one in which, in the case of an indefinite hiring, the law has made, and there was no evidence of any custom making, the hiring a hiring for a year or for any other definite time, nor the notice by which the service is to be determined certain. As to



Judgment.

OSLER,  
J.A.

the hiring we adopt the language of Pollock, C. B., in delivering the judgment of the Court in *Fairman v. Oakford*." It was held that, though there was no hiring for a year, the plaintiff could not be dismissed without reasonable notice.

*Beeston v. Collyer*, 4 Bing. 309, is usually referred to as an authority that if there be no evidence to the contrary, the general engagement of a clerk will be deemed a yearly hiring. No doubt it is one of those cases in which the statement is repeated that if a master hire a servant without mention of time, that is a general hiring for a year. The circumstances were, however, peculiar. The plaintiff had served the defendant, an army agent, as clerk from March, 1793, to 23rd December, 1826, when he was discharged without notice. There was evidence that he had been paid quarterly in 1811, and monthly on the 25th of the month several years previous to his discharge. But the Chief Justice said: "If a master hire a servant, without mention of time, that is a general hiring for a year, and if the parties go on four, five, or six years, a jury would be warranted in presuming a contract for a year in the first instance, and so on for each succeeding year, as long as it should please the parties. \* \* It is not necessary for us now to decide, whether six months, three months, or any notice, be required to put an end to such a contract, because under the circumstances of the present case, after the parties had consented to remain in the relation of employer and servant from 1811 to 1826, we must imply an engagement to serve by the year, unless reasons are given for putting an end to the contract. \* \* The principles upon which the action for use and occupation proceeds are the same as those which formed the ground of my direction to the jury upon the present occasion. The contract is for a year at first, and if the parties do not disagree, it goes on from one year to another. It is true that one of the incidents of a tenancy of this kind is, that it can only be determined by a half year's notice, concluding with that day on which the tenancy commenced. We do not say that conditions are to be engrafted on contracts for the hire of servants."

The plaintiff was held entitled to recover for his salary from the 26th of December until the expiration of the current year on the 1st of March, the Court deciding, apparently from the long continuance of the service and the payment of the salary during one year quarterly, that a contract might properly be implied by the jury to serve by the year. The reservation of opinion on the question whether the contract might have been put an end to by notice had it been a mere general hiring is noticeable in view of the later decisions.

Judgment.

OSLER,  
J.A.

In *Green v. Wright*, 1 C. P. D. 591, it was said by Herschell, Q. C., *arguendo*, "*Prima facie*, no doubt, an indefinite hiring is a hiring for a year determinable by notice if there be a custom, or, in the absence of custom, by a reasonable notice," and the Court would appear to have adopted this statement, saying "There is some authority for saying that, as a proposition of general law, reasonable notice is to be implied as a term of such a contract of hiring as this. Sir John Byles so laid down the law at *nisi prius* in the case of *Hiscox v. Batchellor*, 15 L. T. N. S. 543, and the case of *Fairman v. Oakford*, 5 H. & N. 635, seems, if the facts of it be carefully considered, to be an authority to the same effect."

In that case Pollock, C. B., said, that from much experience of juries he had come to the conclusion "that usually the indefinite hiring of a clerk is not a hiring for a year, but rather one determinable by three months' notice."

In the recent case of *Lowe v. Walter*, 8 Times L. R. 358, an action brought by one of their foreign correspondents against *The Times* newspaper, the plaintiff had been on the staff for several years in receipt of a yearly salary, and he was dismissed on a six months' notice not terminating with the current year of the service. He contended that he was entitled to a twelve months' notice, or to at least six months terminating with the current year. Lord Coleridge ruled that he would tell the jury, that as the plaintiff was engaged at so much a year, *prima facie* the presumption was that it was a yearly contract, but that as

**Judgment.** nothing was said as to notice, in the absence of evidence of custom the question was what was reasonable notice. As to the argument that there must be twelve months' notice or six months' notice ending with the current year, he held that there was no such law, though if it were understood to be so by usage, and the parties contracted on that footing, then it would be so as between them; that the right existed, and with good reasons for it, as to tenants of land, but that he was not aware that the same law existed as to yearly hiring.

**OSLER,  
J.A.**

These principles appear to me to be of general application. I confess I hardly understand exactly the force of the expression that *prima facie* the contract was a yearly one, unless it means that it is so subject to being terminated before the end of the year by reasonable notice. Certainly no higher application is given to it. *Levy v. Electrical Wonder Co.*, 9 Times L. R. 495, accords with this view.

Then to apply these authorities and the principles laid down in them to the present case. Can it be said in this case any more than, for example, in the case of *Green v. Wright*, 1 C. P. D. 591, or in *Lowe v. Walter*, 8 Times L. R. 358, that the law has made, or that there is any evidence making, the hiring one for a year absolutely, or for any other definite time. The parties go on after the expiration of their express contract, one to serve in the same employment, the other to accept the services and to pay therefor at the same rate quarterly as before. How can a contract to serve for another year absolutely be implied from this? Or can the fact that the previous hiring was expressly for one year certain help us to infer an implied contract for a similar period? These, I think, are the only relevant facts, for can there be said to be anything in the nature of the plaintiff's employment which makes it proper to infer a contract for a year absolutely? We may say that it was of such a character as to make it unreasonable that he should be dismissed without notice, but can we say more? There

is no evidence of the existence of any usage in reference to such or similar engagements. I cannot see how the plaintiff is in any better position than was the plaintiff in *Green v. Wright*, 1 C. P. D. 591, *Fairman v. Oakford*, 5 H. & N. 635, or *Lowe v. Walter*, 8 Times L. R. 358; or how, even if the contract is to be described as being *prima facie* a yearly one, it is not subject to be terminated at any time by either party on reasonable notice. Were there even an express contract as to salary at the opening of the second year there might be something to go upon. As it is, all rests in implication, and with the sincerest respect for the opinion and finding of the learned Chief Justice, I am unable to bring myself to the conclusion that any of the relevant facts proved, or all of them together, justify the finding that there was a hiring for a second year absolutely. The most that can be said, in my opinion, is that it was a contract terminable on reasonable notice. In the absence of any evidence of usage it appears to me that three months' notice ought to be held to be reasonable, and therefore that the action must fail, and the appeal be allowed.

Judgment.

OSLER,  
J.A.*Appeal allowed.*

R. S. C.

## MCKIBBON v. WILLIAMS.

*Improvements under Mistake of Title—Mortgage by Person making Them—Enforcement thereof against True Owner—Interest—Set-off of Rents and Profits—Occupation Rent—Assigns—R. S. O. ch. 100, sec. 30.*

A purchaser of land made lasting improvements thereon under the belief that he had acquired the fee and then made a mortgage in favour of a person who took in good faith under the same mistake as to title. Subsequently it was decided that the purchaser had acquired only the title of a life tenant. The mortgagee was never in possession :—

*Held*, that the mortgagee was an "assign" of the person making the improvements within the meaning of section 30 of R. S. O. ch. 100, and had a lien to the extent of his mortgage which he was entitled to actively enforce :—

*Held*, also, that the value of the improvements should be ascertained as at the date of the death of the tenant for life, and that there should be as against the mortgagee a set-off of rents and profits or a charge of occupation rent only from that date till the date of the mortgage :—

*Held*, also, that interest should be allowed on the enhanced value from the date of the death of the tenant for life.

Judgment of STREET, J., affirmed.

**Statement.** THIS was an appeal by the defendants Sarah Jane Evans and Sarah Williamson from the judgment of STREET, J.

By a mortgage dated the 2nd of June, 1890, and made in pursuance of the Act respecting Short Forms of Mortgages, the defendant John B. Williams granted and mortgaged to the plaintiff for the purpose of securing three thousand dollars certain lands in the city of Hamilton. The mortgage contained the usual covenant for payment, and was registered in the proper registry office on the 3rd of June, 1890.

Williams purchased the lands in question in April, 1882, from one Reed, who had purchased from one James Hamilton, the son and devisee of one Andrew Hamilton. In 1892, the defendant Sarah Jane Evans brought an action against Williams and against two tenants under him, of part of the lands in question, claiming a declaration that according to the true construction of the will of Andrew Hamilton, James Hamilton took only a life estate in the lands, and that she, upon the death of James Hamilton, which took place in April, 1886, became entitled to an estate for her life, and that the remainder in fee became

vested in the brothers and sisters of Andrew Hamilton, Statement. and that Williams had no title thereto. This action was tried before FERGUSON, J., who dismissed it, but his judgment was reversed by the Court of Appeal, the construction of the will being declared to be that contended for by Sarah Jane Evans ; and the judgment of the Court of Appeal declared that she was entitled to the possession of the lands in question, and directed a reference to the Master at Hamilton, to take an account of the mesne profits which she was entitled to receive since the death of James Hamilton, and to ascertain the amount, if any, for which Williams was entitled to a lien on the lands for any improvements made thereon. This judgment was affirmed by the Supreme Court of Canada : see *Evans v. King*, 23 O. R. 404 ; 21 A. R. 519 ; 24 S. C. R. 356.

After this the defendant Sarah Williamson obtained from the surviving brothers and sisters of Andrew Hamilton, and from the children and representatives of his deceased brothers and sisters, a conveyance of their estate and interest in remainder in the lands in question.

At the time of the purchase of the lands by Williams, they were vacant and unimproved, and after that and before making the mortgage Williams put up buildings and made other improvements.

The plaintiff contended that Williams was, at the time of the making of the mortgage, entitled to a lien upon the lands to the amount by which the value of the lands had been enhanced by the buildings and improvements, and that he, as Williams' mortgagee, was entitled to enforce that lien.

The defendants Sarah Jane Evans and Sarah Williamson contended that the plaintiff was not entitled to any greater relief than Williams, and that he was bound by the judgment in *Evans v. King*, and could obtain relief only in that action, and should have set off against him, in addition to any allowance for mesne profits or occupation rent, the costs of that action. Williams took the same position, and his solicitors claimed a lien for the costs of the defence of *Evans v. King*.

**Statement.** The action was tried at Toronto, on the 23rd of March, 1896, before STREET, J. It was proved that the defendant Sarah Williamson had refused to be made a party to the action of *Evans v. King*, and that the plaintiff had never been in possession of any part of the mortgaged lands. Judgment was given in his favour as against Williams for the mortgage debt, with a declaration that he was entitled to a lien upon the lands in question to the extent of the amount by which their value was enhanced by the lasting improvements made thereon by Williams; and with a further declaration that this lien had priority over any rights or charges against the interest of Williams created or incurred after the date of the mortgage, but without prejudice to the rights of any person not a party to the action. A reference was then directed to the Master to take an account of the amount by which the value of the lands was enhanced by the lasting improvements made by Williams, no provision being made in the judgment, as issued, for any set off of mesne profits or occupation rent, the learned Judge stating, however, that it would not be necessary to insert such a provision in the judgment, as that was a matter to be dealt with by the Master under the general practice of the Court without any special direction.

The defendants appealed, and the appeal was argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ. A., on the 24th of September, 1896.

*J. W. Nesbitt, Q. C.*, for the appellants. The plaintiff is in no better position than Williams, and the reference directed in *Evans v. King* should be carried on, and the plaintiff given such sum (to the extent of his mortgage claim), as shall in that reference be found to be payable to Williams. The plaintiff has no right to actively enforce a lien, but holds merely an equitable assignment from Williams of what may be found due to him after charging against him occupation rent and deducting costs payable

by him. The judgment is erroneous in not directing specifically that these deductions should be made. Argument.

*W. S. McBrayne*, for the respondent Williams, argued on the same lines, and contended in addition that the solicitors who acted for Williams in the suit of *Evans v. King*, were entitled to a lien on the amount to be allowed to him, in priority to the plaintiff's claim.

*H. Cassels*, for the respondent McKibbon. Section 30 of R. S. O. ch. 100, gives a lien not only to the person making the improvements, but to his assigns, and the plaintiff is, by virtue of his mortgage, an assign of Williams. The plaintiff's rights are in no way dependent on the judgment in *Evans v. King*. That was an action for a declaration of title, and for the recovery of possession; and as neither the plaintiff nor the owners of the estate in remainder were parties to that action, it was impossible to work out in it the plaintiff's rights. It is not contended that the plaintiff as representing Williams is not chargeable with an occupation rent. The judgment follows the wording of the statute, and the Master will allow occupation rent without any special direction.

*J. W. Nesbitt*, Q. C., in reply.

January 12th, 1897. MACLENNAN, J. A. :—

The plaintiff's claim is for improvements made under mistake of title, as provided by R. S. O. ch. 100, sec. 30. The improvements were not made by the plaintiff himself, but by the defendant Williams, who, after making the improvements, and while he was still in possession, believing himself to be owner, mortgaged the property in fee to the plaintiff. The defendants, besides the mortgagor Williams, are Sarah Jane Evans, a tenant for life, and Sarah Williamson, tenant in remainder in fee. The relief sought against Williams is a personal judgment for the mortgage debt, which has been granted, and about which no question arises on this appeal.

The relief sought against the other defendants is the



**Judgment.** enforcement of the lien for improvements, in satisfaction  
**MACLENNAN, J.A.** *pro tanto* of the mortgage debt. It was admitted at the trial that the improvements were made by Williams under the belief that the land was his own, and no question arises upon that point. It was, however, contended that the lien did not pass to the plaintiff by the mortgage. But the statute gives the benefit of the lien not only to the person who has made the improvements, but to his assigns, and it is, therefore, clear that the plaintiff is entitled as mortgagee to the benefit of the lien.

The circumstances were these: One James Hamilton claimed to be owner in fee under a will and a disentailing deed, and sold to one Reed, who sold to Williams in 1882. Williams took possession, and between 1882 and 1886 made the improvements in question, and remained in possession until 1892, when an ejectment was brought against him by Mrs. Evans. In that action it was decided that James Hamilton was not owner in fee at all, but merely tenant for life, and that Mrs. Evans became entitled to possession at his death, which occurred in April, 1886, and judgment passed in her favour for possession with an account of mesne profits; a reference was also directed to ascertain the amount, if any, for which Williams might be entitled to a lien for lasting improvements, and the reference is still pending. When Mrs. Evans brought her ejectment, she also was only tenant for life, and neither the present plaintiff nor the person or persons entitled in remainder was party to that action.

It was contended on the present appeal that the plaintiff's claim must be subject to Mrs. Evans' claim for costs in that action, and to a lien for these costs in favour of her solicitor.

It is clear that no such claim can be supported. That is a matter between her and Williams alone; and the plaintiff in this action being a mere lien holder, and not having been made a party to the other action, cannot be affected thereby. The judgment declares that the plaintiff's lien has priority over any rights or charges

against the interest of the defendant Williams, created or incurred after the date of her mortgage to the plaintiff. That mortgage was made and registered on the 2nd of June, 1890, and the declaration in the judgment was probably intended to exempt the plaintiff, not only from the claim for costs of the former action, but also from the claim for the mesne profits of the land subsequent to the date of the mortgage, and for which Williams is accountable.

Judgment.  
MACLENNAN,  
J.A.

The appellants contend that the plaintiff's claim is subject to a deduction, not merely for the mesne profits prior to the making of the plaintiff's mortgage, but also for those which accrued afterwards, and that in that respect the declaration in the judgment is wrong.

There can be no doubt that if Williams had been a mortgagee in possession, and had assigned his mortgage, or had made a sub-mortgage, he himself still remaining in possession, his assignee or sub-mortgagee could not hold the mortgage free from liability to account for rents subsequently received by his assignor. The reason for that is obvious. The possession taken by a mortgagee is in the nature of a trust which attaches to the legal title in the hands of the mortgagee, and that trust binds the assignee just as it bound the assignor. The possession when taken is as much a part of the security as the title, and a mortgagee is not permitted to sever his security to the prejudice of the mortgagor. Even where a mortgagee in possession assigns his mortgage, and also gives possession to his assignee, without the consent of the mortgagor, he continues to be accountable for the subsequent profits. That is laid down in 1 Equity Cas. Abr. 328, thus: "If a mortgagee in possession assigns over his mortgage, without assent of the mortgagor, the mortgagee is bound to answer the profits, both before and after the assignment, though assigned only for his own debt; for he is under a trust to answer the profits of the pledge; and it is a breach of trust to assign such pledge to a person insolvent."

In the present case, however, Williams was not a mort-

**Judgment.** gagee in possession. He did not take possession for the purpose of realizing his lien. He held possession believing himself to be owner, and he resisted Mrs. Evans' action of ejectment, asserting title as owner. He was not in any sense a trustee. That distinction is established by the decision of the House of Lords in *Parkinson v. Hanbury*, L. R. 2 H. L. 1. The plaintiff, therefore, is not affected by Williams's subsequent possession, as he would have been if that possession had, at the time of the assignment, been as mortgagee.

**MACLENNAN, J.A.**

The question is, what are the rights of the parties having regard to the statute? But for the statute Mrs. Evans' right, at the death of James Hamilton, was to recover the land from Williams in its improved condition. While his estate for the life of James Hamilton continued the land and the improvements thereon were his. When his title expired they became hers, and her title was legal as well as equitable. There was no fraud or concealment of title on her part. Both of them had the same knowledge of the title. It depended on Andrew Hamilton's will, which was known equally to them both. If Williams remained in possession after his title expired he was not only liable to an action of ejectment, but also to an action for mesne profits by Mrs. Evans; and he could claim no compensation for his improvements, or any deduction from mesne profits by reason of them.

The fact that he had made a mortgage could of course neither impair nor qualify the rights of the true owner. But for the statute, therefore, Mrs. Evans' clear legal right would now be to recover possession, and also the full value of the mesne profits for six years before action, against Williams. Then what is the effect of the statute? What it enacts is, that: "In every case in which a person makes lasting improvements on land under the belief that the land is his own, he or his assigns shall be entitled to a lien upon the same to the extent of the amount by which the value of the land is enhanced by such improvements." The enactment then proceeds thus: "Or shall be entitled

or may be required, to retain the land if the Court is of opinion or requires that such should be done, according as may, under all the circumstances of the case, be most just, making compensation for the land, if retained, as the Court may direct." This second part of the enactment is immaterial to the present case, for it has not been suggested that it is a case for the retention of the land by Williams. The effect of the statute, therefore, in the present case, is merely to give Williams a lien upon the land for a sum of money equal to its increased value.

Judgment.

MACLENNAN,  
J.A.

A lien is defined by Lord Westbury in *Cooper v. Phibbs*, L. R. 2 H. L. 171, to be a charge in the nature of a mortgage charge upon the land; and the Legislature must have intended its lien to be of the same nature as the liens already known to the law, and to be enforceable in the same manner. It is not a mortgage in the sense of conferring a legal title, but a charge enforceable in equity and not at law. Therefore, when James Hamilton died, Williams had no longer a legal title, but only a right to enforce a charge against the land. He was liable to be turned out of possession by the owner, and to account for the mesne profits or an occupation rent for such time as he remained in possession after his title expired. On the other hand, he had a right to enforce his lien with the aid of the Court by a sale of the land. These respective rights arose in April, 1886. Williams might then have gone out of possession. He had no right to retain possession. A lien holder, having no legal title, can neither recover possession if he is out, nor can he retain possession if he is in. No doubt he would be entitled to a receiver under the same circumstances as an equitable mortgagee, but that is the most he could have.

It is clear, however, that there is an equitable set off between a claim for mesne profits and a lien upon the land. In *Cawdor v. Lewis*, 1 Y. & C. Exch. 427, where after a recovery in ejectment against a person who had made improvements under circumstances which, it was claimed, gave him a lien for his expenditure, an action for

Judgment.  
MACLENNAN,  
J.A.

mesne profits was brought. The action was restrained in order to the setting off of the one claim against the other. It follows that when Williams assigned his claim for improvements to the plaintiff on the 2nd of June, 1890, that claim being itself in its nature equitable, was subject to Mrs. Evans' equitable right to set off against it the mesne profits up to that time.

Williams could not assign a higher right than he had himself, and therefore the plaintiff took and now holds the lien subject to a deduction for the mesne profits prior to the date of the assignment. It is different, however, with regard to the profits subsequent to the assignment. The plaintiff has not been in possession; he is not liable to an action for those profits. Williams is the only person liable to that action. The plaintiff has the lien such as it was when he got it, and Mrs. Evans has no cross demand against him, either legal or equitable, for the subsequent profits.

The judgment is, therefore, right in declaring that the plaintiff's lien is free from that subsequent claim against Williams. The judgment does not in terms give the defendants a right of set off for the profits before the assignment to the plaintiff; and I think in that respect it should be amended. I think also it should state the time for ascertaining the enhanced value to be April, 1886, when Williams' estate *pur autre vie* came to an end; and that interest should be allowed upon it from that date. In other respects the judgment is right, and the appeal should be dismissed.

I think the amendment of the judgment should make no difference in the disposition of the costs of the appeal.

OSLER, J. A. :—

I agree in the judgment of Street, J. The formal judgment may be corrected by directing a set-off for an occupation rent up to the time of the assignment of the claim for improvements, if it be thought necessary to do so. The

question of the right to an allowance of that kind as against such a claim was considered and determined in the case of *McCarthy v. Arbuckle*, 31 C. P. 405, 408, 415.

Judgment.  
OSLER,  
 J.A.

HAGARTY. C. J. O., and BURTON, J. A., concurred.

*Appeal dismissed.*

R. S. C.

VAN TASSELL V. FREDERICK.

*Will—Construction—Estate—Defeasible Fee—"Die without Issue."*

THIS was an appeal by the plaintiff from the judgment of BOYD, C., reported 27 O. R. 646, and was argued before BURTON, OSLER, and MACLENNAN, JJ. A., on the 26th of January, 1897.

*Moss*, Q. C., for the appellant.

*E. D. Armour*, Q. C., for the respondents The Hastings Loan Company.

*F. E. O'Flynn*, for the respondent Frederick.

March 2nd, 1897. The appeal was dismissed with costs, MACLENNAN, J. A., dissenting, the majority of the Court agreeing with the judgment appealed from.

R. S. C.

## TENNANT V. MACEWAN.

*Bankruptcy and Insolvency—Assignments and Preferences—Assignee's Commission and Expenses—Deputy Resident out of Ontario—R. S. O. ch. 124, sec. 3, sub-sec. 6.*

Where an assignment for the benefit of creditors is made by a resident of Ontario to an assignee residing in Ontario, but all the work in connection with the assignment is done by the assignee's partner residing out of the Province, the assignee cannot recover as against the assignor or retain out of his estate any commission or expenses.  
Judgment of ROBERTSON, J., affirmed.

**Statement.** THIS was an appeal by the plaintiff from the judgment of ROBERTSON, J.

The following statement of the facts is taken from the judgment of OSLER, J. A. :—

The action is for work and services performed by the plaintiff as assignee of the defendant under the Assignments Act for the general benefit of his creditors, in the administration of his estate under the Act, and in procuring a composition and discharge between the defendant and his creditors. A promise by the defendant to pay for such work and service is expressly alleged.

The defence substantially is that under the provisions of section 3, sub-section 6 of the Act (52 Vict. ch. 21, secs. 1, 2) the plaintiff is not entitled to recover anything.

For the purposes of the case the following statement of the facts proved at the trial will be sufficient.

In the year 1894 the defendant was a merchant residing at Sudbury, Ontario. His principal creditors were in Montreal. In the autumn of that year he was getting behind with his payments, and went to Montreal to consult with his creditors there. They appear to have instructed one Hains, described as an accountant, a resident of Montreal, to look into his affairs. Meetings of the creditors were held at Hains' office on the 30th of October and 20th of November, 1894, and at the latter the defendant was required to make an assignment under the Act. This assignment was prepared by Hains, and the assignee named therein

was the plaintiff, then and ever since a resident of Brockville, Ontario. Briefly, it may be said that all the proceedings taken under the assignment, the management of the estate, the arrangement of the composition and discharge, and for the return of the estate to the defendant were taken and done and carried out by Hains alone, without the intervention of the plaintiff, who would appear to have known nothing of the defendant or his affairs until he received a letter from the defendant's solicitors, about the 4th or 5th of June, 1895, stating that as the composition notes given by the insolvent had been accepted by the creditors, he required a re-assignment of all the estate "which passed to you as assignee for benefit of creditors under assignment dated 20th November, 1894."

Statement.

The work and services I have referred to, so performed by Hains, are those which form the subject of the claim in this action.

It appeared that Hains and the plaintiff had been carrying on a partnership in the winding-up of insolvent estates from the early part of the year 1889, the plaintiff having previously thereto been a clerk of Hains in the same business, Hains using the plaintiff's name as assignee in any case where the assignor happened to be a resident of Ontario controlled by Quebec creditors who employed Hains to look after their affairs. In such cases, of which the present is an illustration, Hains did all the work connected with the estate, allowing plaintiff one-third of the net commission after deducting all expenses. In February, 1890, Tennant executed in Montreal a power of attorney to Hains in very general terms to act for him and in his name "individually, or as trustee or assignee," and under this power Hains, as he said, executed the assignment in question by accepting it in the name of the plaintiff as assignee. Before this the assignments had all been sent to Tennant for execution, but afterwards that formality ceased to be observed.

The moneys received from the estate came into the hands of Hains, and were deposited by him to the credit of his



**Statement.** private account in a bank in Montreal, some part of it being afterwards chequed out in payment of accounts in Ontario incurred in connection with the assignment.

The action was tried at Toronto on the 19th of March, 1896, before ROBERTSON, J., who, on the 6th of April, 1896, gave the following judgment:—

ROBERTSON, J. :—

At the close of the plaintiff's case I found it necessary to dismiss the action, on the ground that the assignment had in fact been really taken to one Hains, a resident of the Province of Quebec, although it is nominally taken in the name of the plaintiff, who resided in Brockville, in Ontario, and was therefore in direct violation of the statute of Ontario, 52 Vict. ch. 21 ; and I dismissed the action with costs, reserving for further consideration the defendant's counterclaim, in so far as the defendant claimed to have reimbursed to him whatever moneys the plaintiff, or Hains in the name of plaintiff and acting for him, had collected under the assignment ; and in regard to the claim to have a re-assignment of the estate in favour of the defendant, *i.e.*, the plaintiff by counterclaim.

The action was brought to recover a balance due to the plaintiff amounting to \$627.10 ; the total amount of plaintiff's claim being \$1,114.61, of which \$500 was for "professional services, John McD. Hains holding meetings of creditors, interviews with same at Montreal and Ottawa, procuring two settlements with creditors, correspondence, etc." There was a credit of cash \$485.91, and by stoves \$1.60 ; total credit \$487.51, leaving the aforesaid balance of \$627.10. Besides the commission, as it was called, that is the \$500, there were for disbursements and for work and labour of clerks and others, railway fares, board, etc., advertising in newspapers, clerks' expenses, telegrams, postages, etc., etc., the amount of \$423.26 charged, and there were other items amounting to \$191.35 charged as paid : "McCornish for suit, \$50.00 ; town of Sudbury for taxes, 119.50 ; Kirkwood and McKinnon, \$19.45 ; Wood, \$2.40."

These latter appeared to be legitimate claims due by the defendant, and for which his estate would be liable.

Judgment.  
ROBERTSON  
J.

In regard to these I think I should allow the \$191.35 to be deducted from the amount received, \$487.51, leaving a balance of \$295.16 to be accounted for. As to this, no doubt the defendant Macewan has received full benefit; through the exertions of Hains he had procured a compromise on favourable terms with his creditors. Hains acting for the plaintiff has done a good deal of work, and paid out considerable travelling expenses, as well as for newspaper advertising just in the same way as would have been necessary had the assignment been made in terms within and not in violation of the Act. But I think there are many unconscionable charges in his account; he has on his own evidence charged twenty-five per cent. more for advertising than he actually paid; and the sum of \$500 for "professional services, etc." which really is "commission," besides full charges for all other work done, does to my mind appear very exorbitant; but notwithstanding this I would be inclined to allow what might be considered a fair and reasonable sum for the work actually done and performed, and which resulted beneficially to the insolvent, had the statute permitted; but I think it imperatively forbids any such construction. It declares [52 Vict. ch 21, sec. 1 (O.)], that "no charge shall be made or recoverable against the assignor or his estate for any services or other expenses of any such assignee, deputy or delegate of any assignee who is not a permanent and *bond fide* resident of this Province as aforesaid."

I shall treat, however, as not coming within the prohibition the payment of the four items amounting to \$191.35, as not being "services or other expenses of such assignee," but as preferential claims which the assignee was obliged to pay out of the estate. Deducting, then, this sum from the amount collected by the plaintiff's delegate Hains, leaves \$295.16 to be accounted for; for which the plaintiff by counterclaim is entitled to judgment; but I will not allow any costs of the counterclaim.

Judgment. I may mention that the correspondence between Hains and the defendant and his solicitors, shews that while the latter on behalf of their client were willing to allow a reasonable sum for his expenses and services, Hains would deduct nothing, and insisted upon the whole amount of his bill, besides making threats which no proper business man should have made under the circumstances. The result is that the statute has been invoked, and according to my judgment there is nothing left for it but to dispose of the matter as I have done.

ROBERTSON,  
J.

The plaintiff appealed and the appeal was argued before BURTON, OSLER, and MACLENNAN, J.J. A., on the 6th and 7th of October, 1896. The plaintiff in his reasons of appeal objected that the section of the Assignments Act in question was *ultra vires*, and notice was given to the Attorney-General for Canada, and the Attorney-General of Ontario.

*George Kerr*, and *N. W. Rowell*, for the appellant. The section in question has no doubt been passed in order to prevent persons not residing within the Province from acting as assignees, and to keep the assets of estates within the Province. Here the assignee is a resident of the Province, and there is no reason for depriving him of remuneration for services necessarily rendered outside the Province. Then this is more than an action to recover remuneration given by the Act. There is a contract to pay for the services rendered, and certainly if the plaintiff is not entitled to recover, Hains, who rendered the services, is, and he ought to be added as a co-plaintiff, and judgment given in his favour: *Williams v. Leonard*, 16 P. R. 544; *Ayscough v. Bullar*, 41 Ch. D. 341. The Act refers only to charges for acting as assignee, and granted that no recovery could be had by the assignee *quod* assignee, that does not deprive him of his right to recover for services rendered by him in his private capacity in connection with the composition. At all events the counterclaim should not be

given effect to. Even if the plaintiff has no right of recovery he cannot be called upon to repay moneys legally collected by him and applied in payment of legitimate expenses. At most the contract would be non-enforceable and not illegal, and as far as the receipts have been applied the application cannot be disturbed. The plaintiff is in any event entitled to some remuneration for the responsibility incurred by him: *Pidgeon v. Burslem*, 3 Exch. 465. Legally speaking the work in question was done by the assignee, not by the deputy: *Smith v. Lindo*, 4 C. B. N. S. 395; 5 C. B. N. S. 587. If the section has the effect contended for it is *ultra vires* as in that event it restricts the right of contract between residents of the Province and non-residents, and this is beyond the powers of the local Legislature: *Attorney-General for Ontario v. Attorney-General for the Dominion*, [1896] A. C., at p. 364. Argument.

*Irving, Q. C.*, for the Attorney-General of Ontario. The Act has nothing to do with the contracts of non-residents. It merely places a limitation upon the class of persons who may act as assignees, and deals only with civil rights within the Province.

*H. D. Gamble*, and *H. L. Dunn*, for the respondent. The Act is clear, and this is an effort to evade its beneficial provisions. As is pointed out in the judgment appealed from the defendant offered to pay a reasonable sum for the services rendered, and this offer was refused, and an attempt made to extort the full amount of the claim. The claim should, therefore, be strictly scrutinized. It is too late now for the plaintiff to say that recovery is sought for services rendered in his private capacity. The action is brought by the plaintiff as assignee for services rendered as assignee, and includes in it remuneration voted to the plaintiff as assignee by the inspectors of the insolvent estate. There was a delegation of the trust to a person residing out of the Province, and that is expressly forbidden by the Act. The defendant is entitled to judgment in his favour on the counterclaim. The plaintiff had no

**Argument.** right to use the moneys collected even for payment of expenses. The Act expressly says that no charge shall be made against the assignor or his estate for any services or other expenses. The attempt to deduct the amount paid for expenses is, therefore, illegal, and this distinguishes the case from the authorities cited on behalf of the appellant. It is too late to add Hains as plaintiff even if that would be of any avail. To do so would be a reconstruction of the action : *Hipgrave v. Case*, 28 Ch. D. 356.

*George Kerr*, in reply.

January 12th, 1897. The judgment of the Court was delivered by

OSLER, J. A. :—

The question is whether the plaintiff can recover in the face of the statute, 52 Vict. ch. 21, sec. 1, passed 23rd March, 1889, which adds sub-section 6 to section 3 of R. S. O. ch. 124, An Act respecting Assignments and Preferences by Insolvent Persons.

This sub-section enacts that " no person other than a permanent and *bonâ fide* resident of this Province shall have power to act as assignee under an assignment within the provisions of this Act, nor shall any such assignee have power to appoint a deputy or to delegate his duties as assignee to any person who is not a permanent and *bonâ fide* resident of this Province ; and no charge shall be made or recoverable against the assignor or his estate for any services or other expenses of any such assignee, deputy or delegate of any assignee who is not a permanent and *bonâ fide* resident of this Province as aforesaid."

Now the plaintiff in this case sues as assignee for work and services performed and expenses incurred by him as such. He was himself qualified to be an assignee, being a permanent and *bonâ fide* resident of this Province, and so far the section does not touch him. But he personally has done none of the work, and incurred none of the

expenses sued for. He did not himself perform one of the duties cast upon him by the acceptance of the assignment; nay, he was ignorant of its very existence. He contends that he has a right to recover because Hains did the work, performed the duties and paid the expenses for him, he says, as partner. He is obliged to concede that Hains could not have been assignee or joint assignee with him, because not a resident of this Province. It was impossible for them, therefore, to have been in partnership as such assignee (and the assignment is not, in fact, made to them jointly, but to the plaintiff only), though the profits of such a business carried on by the plaintiff in a lawful way, might, for aught I know, have been brought into some kind of partnership between them. Of course if Hains was the real assignee, he could recover nothing, and *a fortiori* neither could the plaintiff; therefore the plaintiff or Hains through him is obliged to say that he, and not Hains, was assignee. That is the only position he can take. How then did Hains come to do the work? The answer is inevitable that he did it as agent, deputy, or delegate of the plaintiff. There is no other character in which he could have done it so as to give the plaintiff even a plausible right to sue, and the power of attorney of February, 1890, was executed for the express purpose of giving that colour to Hains' proceedings. But Hains was not a permanent and *bonâ fide* resident of this Province, and therefore, the plaintiff being, as I assume in his favour, a lawfully appointed assignee "under an assignment within the provisions of the Act," had no power to delegate to Hains his duties as such assignee. That is plainly what he did, and that is plainly contrary to the express prohibition of the Act. If the section went no further this would be sufficient to defeat the action; but it goes on to enact that "no charge shall be made or recoverable against the assignor or his estate for any services or other expenses of any such assignee, deputy, or delegate of any assignee who is not a permanent and *bonâ fide* resident of this Province

Judgment.

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OSLER,  
J.A.

Judgment.

ONLKE,  
J. A.

as aforesaid." There was some verbal criticism of the language of this clause, to which I think it is not open. Its evident meaning, reading the whole sub-section, is that if the assignee is not a resident he shall not recover; or if he is a resident and so not personally disqualified, he shall not recover for the services of a disqualified deputy or delegate.

It is not necessary to say that what the plaintiff and Hains did was an evasion of the Act. That this was what they were attempting I have no doubt. But in my opinion they only succeeded in actually doing one of the very things which the Act prohibits, and so must suffer the necessary consequence.

It was argued that the services sued for were not performed in the character of assignee under the Act. If that be so they were not done by the plaintiff, but by Hains. That is not the view taken by the plaintiff in his pleading, and I think the argument not tenable. The plaintiff held the defendant's estate as assignee for the creditors; and whether he dealt with it by arrangement between the defendant and his creditors, or by selling it and distributing the proceeds, is, in my opinion, quite immaterial. Everything he did (done, as he has throughout asserted, by his agent Hains), was so done in his character of assignee, and was so treated by him and by the inspectors of the estate who fixed the amount of the assignee's commission, one of the items of the claim which he now seeks to recover. I see no ground on which the plaintiff can by adding Hains as a party, or by setting up an assignment to him of any supposed personal claim of Hains against the defendant.

There was a direct, and a wilful violation of the Act, and therefore the judgment at the trial, dismissing the action, should be affirmed.

Then as to the counterclaim for moneys received by the defendant as assignee. The amount is not disputed, and the learned trial Judge has allowed certain payments made in respect of debts of the estate. The plaintiff being

assignee the moneys in question were received by his agent Hains, and must be regarded as in his hands to be accounted for. He seeks to retain them in respect of the charges and expenses sued for, arguing that even if he is precluded from actively suing for and recovering such charges and expenses he may retain against them the moneys so in his hands. This might, perhaps, be so if the statute merely enacted that they should not be recovered. But the language of the Act is, that no charge shall be *made* or recoverable against the assignee or against his estate for any services or other expenses; and this, I think, shews that there can, under the circumstances, be nothing in respect of which there is even a right to retain the moneys of the defendant. They are in the plaintiff's hands, and he has no claim or set-off against the defendant's demand.

On this ground the cases cited by the plaintiff, so far as they have any application, are distinguishable.

The judgment on the counterclaim should also be affirmed.

It was argued that the statute was *ultra vires* the local Legislature. I think we indicated during the argument our opinion that there was nothing in this point.

The appeal should be dismissed in the usual way.

*Appeal dismissed.*

R. S. C.

Judgment.

OSLER,  
J.A.



## IN RE CAUGHELL AND BROWER.

*Arbitration and Award—Voluntary Submission—Motion to Set Aside Award—Time—52 Vict. ch. 13 (O.).*

A motion to set aside an award made under a voluntary submission must be made before the expiration of the term next after publication of the award, even if three months have not expired.

*In re Priddy and Toronto*, 19 A. R. 503, considered.

Construction of 52 Vict. ch. 13 (O.), discussed.

Remarks as to the necessity of revision of the legislation as to arbitrations.

Judgment of ARMOUR, C.J., affirmed.

**Statement.** THIS was an appeal from the judgment of ARMOUR, C.J.

On the 29th of January, 1896, a voluntary submission to arbitration under seal was entered into between William Brower and Mary Jane Caughell, reciting that differences subsisted between them in respect of certain matters set out, and providing that there should be a reference of these differences to three arbitrators, "provided that they or any two of them make and publish their award in writing on or before the 1st of February, 1896." As to the conduct of the reference it was agreed, *inter alia*, that the parties should not be confined to the production of strict legal evidence, and that the arbitrators were to decide "as they or any two of them thought the very justice of the circumstances required." Neither party was to be at liberty to appeal from the award upon any ground relating to the admissibility or weight of evidence, or relating to the law applicable to the evidence adduced, "it being the desire of both parties that the arbitrators shall finally settle and dispose of their differences as to them may seem right and just in the circumstances." No right to appeal on any other ground was agreed on.

On the 30th of January, 1896, the arbitrators made and published their award, and on the 17th of April, 1896, a notice of motion, returnable on the 28th of April, to set aside the award was served on behalf of Mary Jane Caughell.

This motion was dismissed by ARMOUR, C.J., on the

ground that it was too late, not having been made until after the expiration of what would have been the last day of the period formerly known as Hilary Term. Statement.

Mary Jane Caughell appealed, and the appeal was argued before OSLER, and MACLENNAN, JJ.A., and FERGUSON, J., on the 18th of November, 1896.

*Clute, Q. C., and T. W. Crothers*, for the appellant.

*Armour, Q. C., and J. A. McLean*, for the respondent.

January 12th, 1897. OSLER, J. A. :—

[The learned Judge stated the facts and the objections urged as to the merits, and continued:]

The executrix contends that the motion was made in due time, because by the 6th section of 52 Vict. ch. 13 (O.), an Act to amend the Revised Statute respecting Arbitrations and References, the limit of time for making an application to set aside an award under a voluntary submission is three months after the making and publication of the award, and not as formerly, under the Act of Wm. III., and the provision of the Judicature Act, sec. 56, relative thereto, before the last day of the term next thereafter: *In re College of Christ and Martin*, 3 Q. B. D. 16.

In the case *In re Prittie and Toronto*, 19 A. R. 503, I had occasion to consider the meaning of several sections of the perplexing Act, 52 Vict. ch. 13 (O.). The submission there was a voluntary submission by which were introduced, for the benefit of the parties to it, the provisions of the Municipal Act, R. S. O. ch. 184, secs. 401, 404. The question was whether the motion against the award had been made in time, or whether it should have been made, as was contended, within fourteen days after the filing of the award. I held, and I understand that part of my judgment was not dissented from by the other members of the Court, that the period of fourteen days mentioned

**Judgment.**

**OSLER,  
J.A.**

in the Act did not relate to a motion to set aside an award under a voluntary submission, and that the motion having been made before the end of the term next after the publication of the award it was in time. I was of opinion that the statute of William III., as modified or relaxed by subsequent legislation, still regulated the time within which a motion against such an award should be made. As the motion had been made in time as regarded the term it did not become necessary to pronounce a final opinion upon the effect of section 6 of the Act of 1889 which is now relied upon. That section enacts that an application to set aside an award to which section 4 of the Act does not apply, that is to say, as I construe the Act, an application to set aside an award on an arbitration under the Arbitration Act, R. S. O. ch. 53, otherwise than by way of appeal, shall not be made after the expiration of three months from the making and publication of the award.

No express reference is made to section 33 of the Arbitration Act, which provides that all applications otherwise than by way of appeal to set aside an award made on a compulsory reference under the Act shall be made within one month from the filing of the award, subject to extension by the Court or Judge on special circumstances being shewn, or to section 18, which enacts that in cases in which an appeal does not lie under the Act "a motion to set aside an award may be made in the same manner as heretofore."

As regards compulsory references the provisions of the Arbitration Act may probably be considered obsolete, in consequence of Consol. Rule 550, which came into force on the 1st of September, 1888, "The Court will not refer to arbitration;" and so far, therefore, section 6 of the Act of 1889 may have nothing on which to operate, though its language certainly points rather to a limitation upon a discretion to extend the time for moving against an award, than to a repeal of section 18, by which, read in connection with section 56 of the Judicature Act and 9 & 10 William III. ch. 15, sec. 2, the time, in case of an award

under a voluntary submission, was already fixed, and the substitution instead thereof of a new period. And upon the best consideration I have been able to give to the subject I am of opinion, agreeing in this respect with the learned Chief Justice in the Court below, that section 6 of the Act of 1889 cannot be treated as repealing the statute of William and the 18th section of the Arbitration Act, and substituting another period in which the motion against an award under a voluntary submission is to be made. Its effect may probably be to restrain the generality of section 37 of the Arbitration Act, which enacts that the Court or Judge may at any time, and from time to time, remit the matters referred, or any of them, to the reconsideration of the arbitrator, etc. If this be not the meaning and intention of the section I find it extremely difficult to attach any satisfactory meaning to it.

I think it extremely probable that the draughtsman of the Act framed it without regard to the then recently passed rule 550, and that the real intention of section 6 was to restrict the discretion conferred by section 33 in regard to motions against awards under compulsory references. The result therefore is that the motion in the present case being to set aside the award simply, and not for a reference back to the arbitrators to deal with the matters not disposed of, or at least not formally disposed of, the judgment below must be affirmed.

The grounds, or some of the grounds, on which the motion against the award was made, as well as some observations made by counsel on the argument in answer to my suggestion that a reference back to the same arbitrators was the utmost measure of relief the appellants could expect, shew, I think, that the application was deliberately confined to the relief expressly asked thereby.

I wish to add that the mangled condition in which the statute law on the subject of arbitration has been left by the Consolidated Rule, and the Act 52 Vict. ch. 13 (O), suggests the necessity for legislation on the lines of the Imperial Arbitration Act of 1889.

Judgment.

OSLER,  
J.A.

Judgment. **MACLENNAN, J. A. :—**

**MACLENNAN,**  
**J.A.**

I agree in the judgment just delivered by my brother Osler. I think the conclusion to which he has come is assisted by a consideration to which he has not in terms adverted.

The first section of the Act of 1889 makes a distinction between cases in which an appeal lies under the Revised Statute (R. S. O. ch. 53) and other cases. When we look at the Revised Statute we find that the cases in which there may be an appeal are references made in actions, and voluntary submissions containing an agreement that there may be an appeal. Bearing that in mind we look again at section 1 of the Act of 1889, and it says that the Act, except sections 4, 6 and 7, shall only apply to cases in which an appeal does not lie under the Revised Statute, etc., and that the excepted sections 4, 6 and 7 shall apply to all arbitrations to which the Revised Statute applies. Now it is plain that the Revised Statute applies, to some extent, to all kinds of cases, not merely to compulsory references, but also to references by consent. If, therefore, we do not limit in some way the expression "arbitrations to which the said first mentioned Act relates," there will be a flat contradiction between the first and last members of the section, the first member declaring that sections 4, 6 and 7 shall not apply to cases in which an appeal does not lie, and the last member declaring that it shall apply to all arbitrations. I think the only way to overcome this apparent contradiction is to treat the section as speaking of three kinds of cases, viz., (1) cases in which an appeal does not lie; (2) cases under the Municipal Act; and (3) all other cases mentioned in the Revised Statute, and I suspect that the word "other" has somehow been dropped from the last line of section 1 before the word "arbitrations." So construing the section it follows that sections 4 and 6 do not apply to the present reference, inasmuch as it is voluntary and contains no provision for an appeal.

FERGUSON, J. :—

Judgment.

FERGUSON, J.

I have perused and endeavoured to understand the various statutory provisions bearing upon the subject, and the contentions of the parties. I have also had the advantage of a perusal of the judgment written by Mr. Justice Osler, and the only conclusion at which I can arrive is that the judgment of the learned Chief Justice is right, and I concur in Mr. Justice Osler's judgment.

*Appeal dismissed.*

R. S. C.

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### YOUNG V. WARD.

*Husband and Wife—Employment or Occupation in which Husband has no Proprietary Interest—Letting Lodgings—R. S. O. ch. 132, sec. 5—Fraudulent Conveyance—Attack under Claim of Third Person Acquired by Person Himself Estopped.*

Where a married woman living in a house furnished by her husband, and supporting herself during his temporary absence in search of employment, lets lodgings and supplies necessaries to the lodger, she cannot recover from the lodger the money due as earned by her in an employment or occupation in which the husband has no proprietary interest.

Where a creditor takes the benefit of a conveyance alleged to be fraudulent, and on that ground fails in his action attacking it, the acquiring by him of a small claim and the bringing of another action upon it is an abuse of the process of the Court.

Judgment of the Divisional Court, 27 O. R. 423, reversed.

THIS was an appeal by the defendant from the judgment of the Chancery Division, reported 27 O. R. 423, where the facts are stated, and was argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ.A., on the 18th of September, 1896. Statement.

*J. E. Jones*, for the appellant.

*Cassels, Q. C.*, and *B. E. Swayzie*, for the respondent.

Judgment. January 12th, 1897. HAGARTY, C. J. O. :—

HAGARTY,  
C.J.O.

This action seeks to set aside as fraudulent against creditors the conveyance of a valuable farm property worth at least some \$6,000, conveyed by the defendant Ward to his sons, and by them mortgaged to the father for some \$4,000.

The only creditors of whom we know are the grantor's wife, who has obtained a decree for alimony, and the plaintiff, who has, in the year after the alimony decree and the impeached deed, sued the father for a sum under \$60 for alleged board and maintenance of his wife.

She brought this suit some time before she recovered judgment in the Division Court.

The conveyance to the sons (defendants) was made after the decree for alimony, but before the amount was fixed on the reference to the Master, and there was sufficient evidence to set aside the deed, as made with intent to defeat the wife's claim for alimony.

The wife, however, fully adopted the conveyance by obtaining garnishment orders on the mortgagors for payment to her of the mortgage moneys. After so doing, she, under some unaccountable professional advice, brought an action to set aside the sale to the sons as a fraud on her.

She was of course defeated, and her action dismissed with costs.

The only other creditor whom she could then find seems to have been the plaintiff.

I cannot read the evidence without the clear opinion that the plaintiff was put forward by her to attack the conveyance.

I cannot believe that any one in his or her senses would bring such an action as this for a claim under sixty dollars in the Division Court.

The plaintiff said that Mrs. Ward told her that she had lost her suit, and told her to see her lawyer; that she did accordingly see him, and the result was this action in her name to "break the deed."

The learned trial Judge found as a fact that the action was really Mrs. Ward's action, put forward by her.

Judgment.

HAGARTY,  
C.J.O.

The evidence, allowing for various contradictory statements on the plaintiff's part, seems strongly to support this finding.

So we have two creditors, the wife who has fully accepted the impeached deed, and this Division Court plaintiff.

This suit was tried in the summer of 1895, and at that time the suit in the Division Court had not passed to judgment, being still in controversy.

The claim was for board of the wife down to the 10th of September, 1894, just before execution of the deed, which was on the 7th of September, 1894.

The trial Judge was of opinion that there was no fraud sufficiently proved, and dismissed the action without costs.

The Divisional Court, the Chancellor dissenting, reversed his decision and the defendants appeal.

I have great difficulty in agreeing with the decision below, as to the plaintiff's right to maintain the action for board, or to hold that she was carrying on a business in which her husband had no proprietary interest.

About six months before Mrs. Ward came to stay at the plaintiff's house the husband went away to look for work. There was no quarrel or cause for separation; they appeared to be on friendly terms. The furniture in the house was his property.

She removed to another house with the furniture, etc., which, though her husband's property, was used for accommodating Mrs. Ward, the alleged boarder. She knew where her husband was and his non-employment, though he did not write to her.

She declares that she did not keep a boarding house; she merely gave Mrs. Ward the use of one room, and gave her meals, etc., at times. She never rendered any account to Ward, the husband, or applied to him for payment, but sued him without any warning.

Her suit was still pending in the Division Court when she brought this action at the wife's instigation to set aside the deed to the sons, made a year before.



Judgment.

HAGARTY,  
C.J.O.

When that deed was made Ward had to his knowledge no creditors except the claim of which he then knew nothing.

I am not prepared to hold that this plaintiff had the right to sue. Any action for this alleged support of the wife became and was the right and claim of the husband.

I do not think this case is one calling for any strained view of the rights of married women, nor can I hold that a man leaving his wife and family for six months to look for work under the circumstances of this case loses his right of action and transfers it, as it were, to his wife, who knows where he is and what employment he is in.

If he had returned home about September 10th, 1894, just after the whole claim for board of the wife had fully accrued, I do not see how his right of action could be denied.

It was nearly a year after this date that this case was tried, and his additional absence was urged to point the argument as to his alleged desertion, etc., etc.

It is clear from the evidence and exhibits that the plaintiff could have obtained payment of her execution and costs; and that the defendants' solicitors were ready to pay it. But that would not have answered the use of her claim for setting aside the deed and the plaintiff's adviser did not assent to such a settlement of the Division Court suit.

I think we must allow the appeal.

We may lament the extraordinary amount of legal expenses, most unnecessarily incurred in all these proceedings, but we must, I think, hold that the plaintiff cannot recover.

It is her misfortune that she allowed her name to be used in this way, especially as we must see that her claim could have been recovered in the ordinary course.

We cannot agree with Mr. Cassels that *Allan v. McTavish*, 8 A. R. 440, has been misunderstood, as to the right of the defendants other than William Ward to attack the

judgment against the latter. He is concluded by it, but his vendees have the right to attack it, and deny the existence of any claim by this plaintiff, on which such judgment was recovered. My learned brother Burton's judgment in the case cited fully states the law on the point. See also *Hill v. Thompson*, 17 Gr. 445.

Judgment.

HAGARTY,  
C.J.O.

BURTON, J. A. :—

I am of the same opinion.

OSLER, J. A. :—

I agree with the judgment of BOYD, C., in the Court below.

MACLENNAN, J. A. :—

I also agree with the judgment of BOYD, C.

*Appeal allowed.*

R. S. C.

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## HALSTED V. BANK OF HAMILTON.

*Banks—Bank Act—53 Vict. ch. 31, secs. 74, 75—Security—Form C—  
“Negotiation”—Bankruptcy and Insolvency—Assignments and Pre-  
ferences.*

**Statement.** THIS was an appeal by the defendants from the judgment of MEREDITH, C. J., reported 27 O. R. 435, and was argued before BURTON, OSLER, and MACLENNAN, JJ. A., on the 6th of October, 1896.

*J. J. Scott*, for the appellants.

*Gibbons*, Q. C., for the respondent.

March 2nd, 1897. The Court dismissed the appeal with costs, holding that the case was governed by *Bank of Hamilton v. Sheppard*, 21 A. R. 156.

R. S. C.

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## BLAKELY V. GOULD.

*Bankruptcy and Insolvency—Assignments and Preferences—Transfer of  
Unearned Profits.*

An assignment by way of security of the profit expected to be made out of a contract to do work does not come within the Act respecting Assignments and Preferences and cannot be set aside under that Act. Judgment of STREET, J., affirmed on other grounds.

THIS was an appeal by the plaintiffs from the judgment of STREET, J. Statement.

On the 8th of June, 1893, the defendant Shields entered into a contract with the corporation of the city of Toronto, to do certain work in connection with the Ashbridge's Bay improvements. At the same time he formed a partnership with the defendants the Robertsons for the purpose of carrying out the contract, and assigned the contract to the firm, who in turn assigned to the defendants the Bank of Montreal all moneys payable under the contract as security for advances to be made. Shields was largely indebted to the defendant Gould, who at his request assigned to the Bank of Montreal her interest in moneys deposited in the Commercial Bank of Manitoba, and he upon the security of this assignment obtained an advance of \$1,000 from the bank. As a condition of making the assignment to the bank the defendant Gould insisted upon the assignment to her by Shields of his interest in the contract as security not only for this transfer but also for the indebtedness, and this assignment was made by Shields on the 26th of August, 1893, before any work had been done. At this time the plaintiffs, other than Blakely, were execution creditors of Shields, who was admittedly insolvent. Blakely was appointed by the Court receiver on their behalf of Shields' interest in the contract and obtained leave to bring this action, in which, among other relief, a declaration was asked that the assignment by Shields to Gould was a fraudulent preference. The contract had then been completed, and large profits had been made.

**Statement.** The action was commenced on the 17th of December, 1895, and was tried at the Toronto Spring Sittings of 1896, before STREET, J., who held that there had been pressure and gave judgment in favour of the defendants.

The plaintiffs appealed, and the appeal was argued before BURTON, OSLER, and MACLENNAN, JJ.A., on the 4th of December, 1896.

*Robinson, Q. C., and W. N. Ferguson, for the appellants.*

*W. N. Miller, Q. C., for the respondent Gould.*

*Aylesworth, Q. C., for the respondents the Robertsons.*

*Worrell, Q. C., for the respondents the Bank of Montreal.*

The learned counsel dealt very fully with the evidence and discussed the questions of preference, pressure, and present advance, arising thereon, but in view of the point upon which the judgment turns it is unnecessary to report the argument.

March 2nd, 1897. OSLER, J. A.:—

It is unnecessary to consider the question, which upon the evidence presents a good deal of difficulty, whether the assignment to the defendant Gould was obtained, as the learned trial Judge has held, by the exercise of pressure on the judgment debtor sufficient to rebut any inference of intent to defraud or prefer. There is a clear ground on which the judgment may be supported quite apart from any question of pressure. What was assigned was the debtor's interest in a contract he had entered into with the city of Toronto for the construction of certain works—his future earnings under that contract. Nothing had then been earned; no money was due; and it depended entirely upon the debtor himself whether the contract would ever be carried out, and any money ever become payable under it. Had the debtor then made an assignment for the benefit of his creditors the assignee would have taken nothing in respect of the contract in the

absence of an express charge upon or assignment of it. Until moneys had become payable there was nothing which could have been attached or levied by means of an execution, nor, as I understand the recent cases of *Holmes v. Millage*, [1893] 1 Q. B. 551; *Harris v. Beauchamp*, [1894] 1 Q. B. 801; *Cadogan v. Lyric Theatre*, [1894] 3 Ch. 338, was the case one in which a receiver could properly have been appointed in respect of the moneys to be earned under the contract. There was nothing in short, which, at the date of the assignment complained of, was exigible in execution at the instance of the judgment creditors, and that being so the assignment is not open to attack under the statute of Elizabeth or the Assignments and Preferences Act.

Judgment.

OSLER,  
J.A.

For this reason I am of opinion that the appeal should be dismissed.

MACLENNAN, J. A.:—

One of the objections made to this appeal upon the argument was that the subject of the security impeached was not within the statute of Elizabeth, or any of the other Acts avoiding assignments as fraudulent against creditors. We think that objection is good and must prevail, and that the appeal must therefore be dismissed.

The facts were briefly these: [The learned Judge stated them and continued:] The case made in the statement of claim is that the assignment was made to defeat, hinder, defraud, delay and prejudice the plaintiffs and the other creditors of the defendant Shields, and to give the assignee an unjust preference over his other creditors. Now it is evident, and well settled by authority, that unless the subject of the assignment or conveyance which is impeached is something which could be reached by creditors at the time when the assignment or conveyance is made it is not within the Act at all: *May on Fraudulent Conveyances*, 2nd ed., pp. 17, 22, 23.

Here the subject of the assignment was a contract to

Judgment. perform work. Unless and until the work was performed there could be no return. There might or might not be a profit. The debtor was a member of a partnership firm, and his interest was a share of the profit which might or might not be made after payment of expenses and liabilities of the firm. It is clear that there was nothing when the assignment was made which could be reached by creditors by any known legal process. That being so, the assignment had no effect such as is attributed to it of hindering, delaying or defrauding creditors, and the action must fail.

MACLENNAN,  
J. A.

The appeal should be dismissed.

BURTON, J. A. :—

I am of the same opinion.

*Appeal dismissed.*

R. S. C.

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## THE TRUSTS CORPORATION OF ONTARIO V. RIDER.

*Chose in Action—Parol Assignment—R. S. O. ch. 122, sec. 7.*

A parol assignment of a chose in action is valid, notwithstanding section 7 of the Mercantile Amendment Act, R. S. O. ch. 122.  
Judgment of FALCONBRIDGE, J., 27 O. R. 593, affirmed.

THIS was an appeal by the plaintiffs from the judgment Statement of FALCONBRIDGE, J., reported 27 O. R. 593.

The only question was whether book debts could be assigned by parol. FALCONBRIDGE, J., held that they could be so assigned, and the plaintiffs' appeal from that judgment was argued before BURTON, OSLER, and MACLENNAN, JJ.A., on the 7th of October, 1896.

*F. A Anglin*, for the appellants.

*D. Urquhart*, for the respondent.

The line of argument and the authorities relied on are stated in the report below.

March 2nd, 1897. OSLER, J. A. :—

The Act 35 Vict. ch. 12 (O.), the provisions of which are now found in sections 6 to 12 of the Mercantile Amendment Act, R. S. O. ch. 122, was one dealing with matters of procedure, enacting that in certain cases assignments of choses in action should be enforceable at law, that is to say, by action by the assignee in his own name, and in any case within the Act the assignee was bound so to sue, instead of suing in the name of the assignor at law or in his own name in equity. The Act made every debt or chose in action arising out of contract "assignable at law by any form of writing," but did not restrict or prohibit its assignment in any other manner. An assignment in writing was essential to the right of the assignee to enforce it at law in his own name, but even an assignment so made did not confer that right unless it was an assignment of the



Judgment.

OSLER,  
J.A.

whole beneficial interest. Plainly, therefore, the object of the Act was not to declare that thenceforward choses in action should only be assignable in writing, but only that when so assigned in a certain way and under certain circumstances the assignee might and should enforce them by action at law in his own name.

In the statute law revision of 1877 the Act appears in the terms in which it was originally passed, but in the revision of 1887, the revisers, having regard to the union and consolidation of the Courts of Law and the Court of Equity effected by the Judicature Act of 1881, and to Rule 102 of that Act, seem to have thought that the words "at law" in the passage above quoted were no longer necessary or were meaningless, and they were accordingly dropped. Rule 102, by introducing G. O. Ch. 58, (7), permits the assignee of any chose in action to institute an action in respect thereof without making the assignee a party. It is thus a more comprehensive provision in this respect than section 7 of the statute. In cases which were within the Mercantile Amendment Act he must sue in his own name. But unless in the Judicature Act and Rules of 1881 something can be pointed to which in other respects altered the law as to the transfer of choses in action by impliedly declaring that they should only be assignable by writing, the omission of the words referred to cannot in my opinion have that effect. We have nothing in the Judicature Act corresponding to the provisions of the English Act on the subject except the clause relating to conflicting claims to the debt assigned, and therefore need not refer to the English cases and text books. We need consider only the provisions of the Mercantile Amendment Act as found in the revision of 1877, and by the Act respecting the revision of 1887, 50 Vict. ch. 2, sec. 9, (O.) it is expressly enacted that the Revised Statutes shall not be held to operate as new laws, but shall be construed and have effect as a consolidation of the law as contained in the Acts and parts of Acts for which they were substituted.

There is nothing in those Acts from which we can infer that for the future choses in action were not to continue to be assignable by parol, nor anything in the revision of 1887 which is not in effect the same as regards the legislation in question as it was before that revision, so as to bring into operation sub-sections 2 and 3 of section 9 above cited; in other words, the omission of the words "at law" leaves the statute law on the subject the same as before.

Judgment.

OSLER,  
J.A.

I am therefore of opinion that the debts mentioned in the special case became the property of the defendant by a sufficient parol assignment, and that the judgment of Falconbridge, J., should be affirmed.

MACLENNAN, J. A. :—

The only question in this case is whether the omission of the words "at law" from section 7 of the Mercantile Amendment Act, R. S. O. ch. 122, by the revisers of the statutes in the year 1887, has altered the law, so that an assignment of a chose in action can no longer be made without writing. I am of opinion that the omission of these words has not had that effect.

Before the year 1872 the legal title in a chose in action could not in general be assigned or transferred at all. The most formal assignment even by deed, and for full value, only operated to transfer the equitable or beneficial interest, and the assignee could only sue and recover at law in the name of the assignor. On the other hand, in general, the equitable or beneficial interest in such property did not require either deed or writing for its effectual transfer, but passed as the result of any parol contract, which was not *nudum pactum*, and perhaps in other ways. That was found to be an inconvenient state of the law, and the Act of 1872, 35 Vict. ch. 12 (O.) enacted that every debt and chose in action arising out of contract should be assignable at law by any form of writing. The effect of that was very obvious. It left the power and means of assigning the bene-

Judgment.  
MACLENNAN,  
J.A.

official interest as it was before, and it enabled the legal title to be assigned also, but only by writing. The beneficial interest might still be assigned by parol, but if an assignment of the legal title was also required, that could only be got by writing. It is evident, I think, that the use of the words "at law" in the Act had reference merely to the legal, as distinguished from the equitable or beneficial, interest. It was the legal interest alone which called for remedy, and the effect of the Act would have been precisely the same if the words "at law" had been omitted. They were in effect descriptive words, signifying and expressing more clearly what was being dealt with by the Act, which was evident enough without them. Then came the Judicature Act in 1881, which by sections 16 and 17 (now 52 and 53) conferred both legal and equitable jurisdiction on the High Court, and by section 17 (10) [now 53 (12)] declared that wherever there was any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity should prevail. The Legislature made no change in the Act of 1872. It was left as it had been before. It did not assume to abolish the distinction between the legal and beneficial interest in a debt or chose in action, for the legal title might still be in one person and the beneficial interest in another. To have done so would have been to abolish trusts in such property. Then came the revision of 1887, and the words "at law" were omitted from the Act. It is now contended that the omission of these words has changed the law so that neither the legal nor the beneficial interest in a debt can be transferred without writing. The only intimation that the corresponding, but very different, enactment in the English Judicature Act has had that effect, to be found in any book of authority, so far as I am aware, is in Chitty on Contracts, 12th ed., p. 861, cited by Mr. Anglin; while there is an equally distinct opinion to the contrary in Coote's Law of Mortgage, 5th ed., p. 557. The last edition (6th) of Pollock is silent on the subject, and the only authority cited by Chitty is *In re Richardson*,

*Skillico v. Hobson*, 30 Ch. D. 397, which merely deter- Judgment.  
 mined, what was well settled before, that a voluntary assignment by mere parol is not sufficient: *Ellison v. MACLENNAN,*  
*Ellison*, 1 W. & T. L. C. 6th ed., p. 291; *Edwards J.A.*  
*v. Jones*, 1 M. & Cr. 226; *Gott v. Gott*, 9 Gr. 165. What our  
 Act declares is that choses in action shall be assignable by  
 any form of writing. *Prima facie*, that only means that so  
 far as before they were not assignable at all, they are now  
 assignable by writing, and I do not think we are warrant-  
 ed in going beyond the natural meaning of the words used,  
 and by construction and implication attributing to the  
 Legislature the intention to make a very great and serious  
 change in the law. We know that in the revision of the  
 statutes the Legislature did not intend to make substantial  
 changes, but merely to express with greater clearness what  
 was already the law. Therefore I think the change con-  
 tended for has not been made, and that the assignment in  
 question, though not expressed by writing, is good.

In my opinion the appeal should be dismissed.

BURTON, J. A. :—

I agree.

*Appeal dismissed.*

R. S. C.

## DOYLE V. NAGLE.

*Will—Construction—Falsa Demonstratio—Lot Described by Wrong Number.*

A testator who was the owner of the south-west quarter of lot twelve in the fourth concession and of lot twelve in the fifth concession of a township and of no other real estate, after providing for payment of his debts and funeral expenses by his executors, declared that "the residue of my estate which shall not be required for such purposes I give, devise and bequeath as follows," and then devised "the south-westerly quarter of lot eleven, concession four" and lot twelve in the fifth concession:—

*Held*, that the word "eleven" might be rejected as *falsa demonstratio* and the devise read as if it were "the residue of my real estate in the fourth concession."

*Doe d. Lowry v. Grant*, 7 U. C. R. 125, applied and considered.  
Judgment of FALCONBRIDGE, J., affirmed.

**Statement.** THIS was an appeal by the plaintiff from the judgment of FALCONBRIDGE, J.

The action was brought for the construction of the will of Owen McGovern, who died on the 7th of January, 1894, having first made the will in question, dated the 24th of August, 1891, of which the material portions were as follows:—

"My will is first, that my just debts, funeral charges, and the expenses attending the drawing of this my will, and the administration of my estate, shall be paid by my executors hereinafter named. The residue of my estate which shall not be required for such purposes, I give, devise and bequeath as follows:—

I give, devise and bequeath to my son James, his heirs and assigns forever the south-westerly quarter of lot number eleven, concession four, in the said township of Adjala.

I give, devise and bequeath to my said son James, his heirs and assigns forever, my farm consisting of part of the west half of lot number twelve, in the fifth concession of the said township of Adjala, containing seventy-six acres, be the same more or less, on condition that he shall pay all my debts and the following legacies, viz.: to my wife Catharine three hundred dollars to be accepted by her in lieu of dower and to be paid as follows, one hundred dollars

within one year next after my death, and one hundred dollars in each of the then next two succeeding years; to my daughter Isabella one dollar within one year next after my death; to my daughter Margaret Jane one hundred dollars when she shall attain the age of twenty-one years; to my daughter Anne one hundred dollars within four years next after my death; to my daughter Ellen one hundred dollars when she shall attain her majority; and to each of my daughters Mary and Catherine one dollar; I give on the same condition to my said son James one span of horses, his choice. In case my said son James shall fail to pay any portion of said debts or legacies at the proper time, then I empower my executors to sell the aforesaid seventy-six acre farm, and out of the proceeds thereof to pay all my debts, legacies and expenses, and hand the surplus, if any, to my said son James, or his legal representative. I empower my executors to sell all my chattels not herein otherwise provided for, and apply the proceeds to payment of my debts and testamentary expenses." Statement.

The testator had, at the time of the making of the will, and at the time of his decease, no title to or interest in the south-westerly quarter of lot eleven, in the fourth concession of the township of Adjala, but was the owner of the south westerly quarter of lot twelve in the fourth concession of that township. The plaintiff, who was a daughter of the testator, claimed that there was an intestacy as to the latter lot.

The action came on by way of motion for judgment on the 21st of May, 1896, before FALCONBRIDGE, J., who held that the lot in question passed to the defendant James McGovern under the will, the case, in his opinion, being governed by *Hickey v. Hickey*, 20 O. R. 371.

The plaintiff appealed, and the appeal was argued before BURTON, OSLER, and MACLENNAN, JJ.A., on the 23rd of November, 1896.

**Argument.**

*M. Scanlan*, for the appellant. The case of *Hickey v. Hickey*, 20 O. R. 371, is distinguishable. The words "my property" were used there and there is nothing of that kind in this will to enable the property to be identified. This is a direct devise of a property that the testator did not own, and it is impossible to resort to extrinsic evidence to shew what his intention was. Intention has nothing to do with the question: *Stanley v. Stanley*, 2 J. & H. 491. See also *Summers v. Summers*, 5 O. R. 110; *Hickey v. Stover*, 11 O. R. 106; *Campbell v. Campbell*, 14 U. C. R. 17; *Re Bain and Leslie*, 25 O. R. 136; *Barber v. Wood*, 4 Ch. D. 885; *Pedley v. Dodds*, L. R. 2 Eq. 819.

*D. Ross*, for the respondents in the same interest.

*J. Hood*, for the respondent *J. McGovern*. Taking the whole will together, it is clear that the testator's intention was to devise the property in question to this respondent. He begins by stating that he intends to dispose of the residue of his estate, and from this it is manifest that he did not deliberately mean to die intestate as to his land in the fourth concession. The appellant is attempting to treat the case as if the testator had not only devised to this respondent lot number eleven, which he did not own, but had also devised to some one else lot number twelve, which he did own. The clear construction of the will is that the testator is devising to this respondent the residue of his estate in the fourth concession, and reading the will in this way, the word "eleven" may be rejected as *falsa demonstratio*. The cases cited by the appellant are distinguishable. In *Summers v. Summers*, 5 O. R. 110, there were several devises, and there was no inconsistency in holding that there was intestacy as to part of the estate. In *Hickey v. Stover*, 11 O. R. 106, there was merely a specific devise of land which the testator did not own. This case is not distinguishable from *Doe d. Lowry v. Grant*, 7 U. C. R. 125. See also *Wright v. Collings*, 16 O. R. 182; *McFadyen v. McFadyen*, 27 O. R. 598; *Re Shaver*, 6 O. R. 312.

*M. Scanlan*, in reply.

March 2nd, 1897. BURTON, J. A.:—

Judgment.

BURTON,  
J.A.

The only property which the testator owned in the fourth concession of Adjala was a portion of lot twelve.

By his will he devised a portion of lot eleven in that concession to his son James—a property he did not own either at the time of the making of his will or at the time of his death.

There can be very little doubt that what the testator intended to devise was lot twelve; but if there was nothing further in the case than the facts I have just stated, there is a clear and well defined rule of law which stands inexorably in the way of receiving evidence that that lot was intended.

But I agree that if there is other language in the devise sufficient to identify the property as the subject of the devise, such as describing it as in the possession of his tenant or otherwise, the word “eleven” might be rejected as *falsa demonstratio*.

The question is, is there anything in this will which can be laid hold of for that purpose?

I think there is.

[The learned Judge read the will and continued :]

Evidence was of course properly receivable to shew of what his estate consisted, and it then appears that the whole of the real estate of which the testator was seized at the time of the making of the will or at the time of his death consisted of the south-west quarter of lot twelve, in the fourth, and his farm proper, consisting of part of the west half of twelve, in the fifth concession.

It appears clear, therefore, that he intended to devise the whole of that residue in separate parcels; that portion lying in the fourth concession was the subject of one devise, that in the fifth of another. It is not different in principle, as it seems to me, from a case in which the devise was of “my farm consisting of lot eleven, in the fourth concession,” and in such a case the word “eleven” might be rejected as *falsa demonstratio*, there being sufficient to pass



Judgment.  
BUTON,  
J.A.

the farm as lying in the fourth concession, that being the only property in the fourth concession owned by the testator and answering the description.

*Doe d. Lowry v. Grant*, 7 U. C. R. 125, is not nearly so strong a case as the present, as there was no express devise of the whole of the lots in Huntley to any one, but merely a declaration of his intention to devise them all; and I should have shared the doubts which the Chief Justice evidently entertained in arriving at the conclusion which was reached there; but that decision has remained unreversed for nearly half a century, and should as a rule of property be now followed, even if we were not altogether satisfied of its soundness.

I am of opinion, therefore, that this devise can be upheld against the objection, and that the judgment should be affirmed.

OSLER, J. A. :—

This case cannot in my opinion fairly be distinguished from *Doe d. Lowry v. Grant*, 7 U. C. R. 125, decided in the Court of Queen's Bench in the year 1857, the principle of which has frequently been recognized. There the will was "Know ye that I Michael Lowry do bequeath in the following manner all and every part of my real property situated in the township of Huntley, viz.," then followed some small pecuniary bequests, "also the north half of lot 26 in the 6th concession of Huntley and No. 23 in the 6th concession of Huntley, being the front half, and the front half of 22 in the 7th concession of Huntley, also the south east of 19 in the 6th concession of Huntley—to be divided equally between Edward Lowry and Samuel Lowry." The testator owned four lots in the township and no more, one of them was lot 22, in the sixth concession. Sir John Robinson said: "In this case the testator affords us clear proof that he did intend to devise distinctly all his lands in Huntley to these two sons, but by mistake he has misnamed one of the parcels. When we are told he did not

own lot 26 in the 6th concession, that creates an ambiguity <sup>Judgment.</sup>  
 —a doubt, by reason of this extrinsic evidence, which <sup>OSLER,</sup>  
 doubt we may resort to extrinsic evidence for removing; <sup>J.A.</sup>  
 and by that evidence we learn, that, besides the three parcels devised to Edward and Samuel, he did own a fourth parcel which was in the 6th concession of Huntley, and that so far the description is correct, but that it is not lot 26 but lot 22 in that concession." It was held that lot 22 passed under the devise.

In the case at bar the testator did not own the south-westerly quarter of lot eleven in the fourth concession, but did own the south-westerly quarter of lot twelve in that concession. He has said that he intended to devise the residue of his estate, and he has called the two parcels of land which he immediately proceeds to describe, that residue, which, by devising "as follows" he has also shewn that he intended to devise to his son James. James has, therefore, got a devise of the residue, but when you come to look at the particular description, the extrinsic evidence shews that it does not accurately describe one of the parcels, although it fits another parcel which the testator did not own. A latent ambiguity is thus disclosed; the residue is devised, by that description, that is to say, "the residue of my estate," but the devise by that description fails if it is limited or confined to the particular description in all its parts which follows of a lot which the testator did not own.

Taking all the words of description together, and having ascertained by the extrinsic evidence that the latter do not accurately fit in with the former in every particular, though they do in some, *i.e.*, as to the part of the lot and the concession, this seems to be one of those cases in which extrinsic evidence is admissible for the purpose of shewing the error in the subordinate words of description in accordance with the principle exemplified by *Doe d. Lowry v. Grant*, 7 U. C. R. 125; and enunciated in *Stanley v. Stanley*, 2 J. & H. 491; *Hardwick v. Hardwick*, L. R. 16 Eq., at p. 175, and *Charter v. Charter*, L. R. 7 H. L., at p. 377, *per*

Judgment.

OSLER,  
J.A.

Lord Cairns. See also *Hickey v. Hickey*, 20 O. R. 371, where on a devise of "my property known as part of lot No. 8 in the second concession south of Dundas street," it was held that lot 8 in the first concession passed, the testator having no property in the second concession. The cases of *Hickey v. Stover*, 11 O. R. 106; *Re Bain and Leslie*, 25 O. R. 136, illustrate the distinction between such cases and the present. There, there was nothing but the bald gift of the wrong lot distinctly described, and if the wrong description was rejected on the admission of the parol evidence there was nothing left—nothing under which it could be said the testator had shewn his intention to devise anything. *Summers v. Summers*, 5 O. R. 110, relied upon by the appellants, was, having regard to the principle of the decision, a similar case, for although there was a residuary devise there I think it was taken to have relation to the personalty. At all events the learned Judge by whom it was decided appears to have distinguished it in *Re Bain and Leslie*, 25 O. R. 136.

The appeal must be dismissed with costs.

MACLENNAN, J. A. :—

I am of opinion that this judgment should be affirmed.

At the date of the will and of the testator's death the only lot which he owned in the fourth concession was the south-west quarter of lot twelve; and the question is whether that lot passed by the will to James, and I agree with my learned brother Falconbridge that it did.

It is clear that by the first clause of the will the lot in question was charged with the payment of debts and of testamentary and administration expenses, 2 Jarman, 5th ed., p. 1291, and therefore that for the purpose of construing his will it is part of his residue. When, therefore, he devises to James the south-west quarter of lot eleven in the fourth, it is as if he had said "my lot, the south-west quarter of eleven, in the fourth concession." [When the situation of the tes-

tator's property is shewn, it is found that the whole of the words he has used to describe that part of it are not applicable. The description is all applicable but one word, the word "eleven." There is an ambiguity. Part of the description is applicable to the testator's land and part is not, but is applicable to other land. But when the testator has distinctly said that it is his own land that he is disposing of, he enables us to see his meaning, and to reject that part of the description which is inapplicable and false. If the testator had said, "I give James my lot in the fourth concession, that is to say, the south-west quarter of lot eleven," and had no other land in the fourth concession, there could be no doubt the last part of the description would be rejected as *falsa demonstratio*. I think this case is stronger. It is as if he had said, "I give James my south-west quarter lot in the fourth concession, being part of lot eleven." The whole description fits the surrounding circumstances and the estate of the testator, but the one word "eleven," and when that word is rejected it leaves a good description of the testator's land.

I think this conclusion is assisted by the circumstance that the testator's debts are expressly charged upon the lot in question, and that the burden of paying them is imposed upon James. I think the judgment and the reasoning of the late Sir John Robinson in *Doe d. Lowry v. Grant*, 7 U. C. R. 125, is entirely applicable to this case, and I am unable to distinguish that case from the present.

Judgment.  
MAULENSAN,  
J.A.

*Appeal dismissed.*

R. S. C.

ATTORNEY-GENERAL V. HAMILTON STREET RAILWAY  
COMPANY.

*Sunday—Street Railway—Lord's Day Act—R. S. O. ch. 203, sec. 1—  
"Conveying Travellers."*

A company incorporated for the purpose of operating street cars does not come within the Lord's Day Act, R. S. O. ch. 203, sec. 1.

*Per* BURTON, J. A. :—Taking persons in street cars from point to point in a city is not "conveying travellers" within the meaning of the Act. *Regina v. Tinning*, 11 U. C. R. 636, and *Regina v. Daggett*, 1 O. R. 537, considered.

Judgment of ROSE, J., 27 O. R. 49, affirmed.

**Statement.** THIS was an appeal by the plaintiff from the judgment of ROSE, J., reported 27 O. R. 49.

The action was brought by the Attorney-General for Ontario, upon the information of one John Henderson, to restrain the Hamilton Street Railway Company from operating its road on Sundays. The defendant company was incorporated by 36 Vict. ch. 100 (O.). In 1893 it adopted the electric system, and by 56 Vict. ch. 90 (O.), was re-incorporated, and by that Act a by-law passed by the corporation of the city of Hamilton, regulating the mode of operation of the road, was validated. The by-law contained a provision that the council should have the right to require that the cars should commence running "as early as 6 o'clock a.m. of each day in the year (Sundays excepted) and continue running until 11 p.m." There was no other reference to Sundays in the by-law, or in either of the Acts. The informant contended, however, that the defendants came within the provisions of section one of R. S. O. ch. 203, "An Act to prevent the profanation of the Lord's Day." That section is as follows :—

"It is not lawful for any merchant, tradesman, artificer, mechanic, workman, labourer, or other person whatsoever on the Lord's Day, to sell or publicly shew forth, or expose, or offer for sale, or to purchase, any goods, chattels, or other personal property, or any real estate whatsoever, or to do or exercise any worldly labour, business or work of his ordinary calling (conveying travellers or Her Majesty's

mail, by land or by water, selling drugs and medicines, and other works of necessity and works of charity only excepted).” Statement.

The action was tried at Hamilton on the 14th of November, 1895. It was proved that several railway trains arrived at and left Hamilton on Sundays, and there was general evidence to the effect that passengers by those trains used the street cars. It was admitted, however, that the street cars were on that day used chiefly by persons residing in Hamilton going from place to place in that city. There was also some general evidence that the running of street cars was a nuisance, and that property past which they were run on Sundays was to some extent lessened in value. ROSE, J., held, however, on the authority of *Sandiman v. Breach*, 7 B. & C. 96, and cases of that class, that the defendants did not come within the section, and he also expressed the opinion that even if the Act did apply, the defendants were within the exception as to conveying travellers.

The plaintiff appealed, and the appeal was argued before BURTON, OSLER, and MACLENNAN, JJ.A., on the 13th and 14th of January, 1897.

Moss, Q.C., and A. E. O'Meara, for the appellants. The section of the Act is as wide as words can make it, and the learned Judge was in error in holding that the defendants did not come within it. The foundation of the legislation is 29 Car. II. ch. 7, and the earlier cases turned on the question of the nature of the act done and not on the question of the nature of the occupation of the person doing the act. Until *Sandiman v. Breach*, 7 B. & C. 96, the doctrine of *ejusdem generis* was not invoked, and though that doctrine is referred to in that case, the decision did not depend on that principle, but went upon the point that there being specific mention of certain classes of carriers in the Act the general words did not apply. That view might possibly still be good in

**Argument.** England, but our Act has no such clause as to carriers. Our Act appears first as 8 Vict. ch. 45, and is different in many respects from the Act 29 Car. II. ch. 7. For instance, the clause as to drovers is left out, and the inference is that the intention was to avoid making any exception. Any person having an ordinary calling comes within the Act. That specific exceptions have been made, is the strongest possible argument that as to all other persons the general words are to govern. Then clauses 4 and 6 of the Act of Charles are in our Act brought together, making the exception part of the general clause. The conveying of travellers or Her Majesty's mail could not come within the ordinary calling of a merchant or tradesman, and this shews that the words "other person whatsoever" must have been intended to mean what the words themselves say. In *Regina v. Tinning*, 11 U. C. R. 636, the differences between our Act and the English Act are pointed out. *Regina v. Budway*, 8 C. L. T. Occ. N. 269, and *Regina v. Somers*, 24 O. R. 244, following it, are authorities against the present contention, but those cases do not seem to have been fully argued, and the differences in the wording of our Act and the English Act do not seem to have been pointed out. But it is argued that the enumeration of the special classes was unnecessary if the words "other person whatsoever" are given effect to. That is true, but those words were probably inserted as a sort of interpretation clause. The great difficulty in the way of the other construction is that it assumes that the Legislature was legislating against certain classes only, and even then was leaving in doubt the persons aimed at. It is said too, that even if the Act applies at all, the defendants are protected by the exception as to conveying travellers. This, it is submitted, is an erroneous construction of that exception. "Conveying travellers," must mean something more than taking people up and down the streets of their own city. A traveller must be a person journeying to some objective point. *Regina v. Tinning*, 11 U. C. R. 636, is clear on that point, and the

reasoning of that case is unanswerable. The learned Argument.  
Judge in the Court below holds, however, that *Regina v. Duggett*, 1 O. R. 537, is inconsistent with *Regina v. Tinning*, and follows it in preference to the earlier decision. Apart from any question as to the merits of the two decisions, however, there is a ground of distinction. In the *Daggett* case, the defendants were acquitted on the ground that there were among the people on board the steamer a number of *bond fide* travellers. The English cases under the Licensing Acts have no application. There is a statutory definition there of the word "traveller," and they do not throw any light upon the meaning, in a general sense, of that word. These defendants can not be said to be engaged in conveying travellers. It is true that travellers may use the street cars, but using the street cars does not make the persons using them travellers. The conveying of travellers is placed in the same class as works of necessity, which shews the restricted meaning which is intended to be given, necessity here meaning something that is indispensable, and not something that is merely convenient or done for gain : *Phillips v. Innes*, 4 Cl. & F. 234. Operating street cars on Sunday has been held in several of the States not to be a work of necessity : *Johnston v. Commonwealth*, 22 Pa. St. 102 ; *Sparhawk v. Union Passenger R. W. Co.*, 54 Pa. St. 401 ; *Sullivan v. Maine Central R. W. Co.*, 82 Me. 196 ; *Commonwealth v. Matthews*, 152 Pa. St. 166. No business of a general character can be held to be a work of necessity. The use of the word "only" in the exception is for the purpose of making this clear : *Wilkinson v. State*, 59 Ind. 416 ; *McGatrick v. Wason*, 4 Ohio St. 566 ; *Davis v. Somerville*, 128 Mass. 594 ; *Commonwealth v. Knox*, 6 Mass. 75. In speaking of travellers, the Act, it is submitted, has reference to what may be now called through traffic. When Sunday intervenes while a person is prosecuting a journey, the conveying of that person on Sunday is a work of necessity within the meaning of the Act. The expression "or Her Majesty's mail," implies a reference to through traffic of this kind, and linked as the



**Argument.** words are with "selling drugs and medicines," it is evident that urgent necessity only was intended to be protected. The history of the legislation confirms this view. The old English Statutes, 1 Car. I. ch. 1; 3 Car. I. ch. 2, and 29 Car. II. ch. 7, were in force when the Canadian Statute 8 Vict. ch. 45, was passed, and are still in force in this Province. By these statutes all ordinary local traffic by carriers, waggoners, etc., was forbidden, but a short time before the passing of 29 Car. II. ch. 7, a system of through traffic between distant parts of the United Kingdom by means of stage coaches was introduced, and from this was afterwards developed the through system of carriage of travellers and the mail by mail coaches. While all ordinary traffic was forbidden this special through traffic was held to be lawful as not covered by the Act 29 Car. II. ch. 7, and the exception contained in our Act is the modern equivalent of this: *Rex v. Middleton*, 4 D. & R. 824. The word "passenger" is used in this and several other statutes, while the word "traveller" is used only in this Act, and it is evident that the latter word is used in a much more weighty sense. The word "conveying" also emphasizes this, and is used as implying delivery at a definite destination. The word is used in several Acts in this sense, as for instance in the Post Office Act, and the Railway Act. From the almost contemporaneous use of the word "traveller" in the special petition in the Litany for "travellers by land and by water," it is clear that, historically speaking, the word was used as referring to persons who were taking a journey of such magnitude as to expose them to special peril. It can scarcely be contended that the special protection of the Deity is needed for the physical protection of a person taking an airing of an hour or two in a street car on a Sunday afternoon. It is clear on the evidence that the cars are used on Sunday chiefly for the purpose of recreation and amusement, and the onus is on the defendants to bring themselves within the exception. It is not enough for them to shew that possibly some of the persons using

the cars are *bond fide* travellers. The cars were not run- Argument.  
 ning merely to meet trains or for any limited purpose of  
 that kind. There is also sufficient evidence to justify an  
 injunction against the operation of the cars on Sunday as  
 being a public nuisance: *Soltau v. DeHeld*, 2 Sim. N. S.  
 133, and the intervention of the Attorney-General is justi-  
 fiable: *Barber v. Penley*, [1893] 2 Ch. 447; *Cooper v. Wit-  
 tingham*, 15 Ch. D. 501; *Cory v. Yarmouth and Norwich  
 R. W. Co.*, 3 Hare 593; *Rapier v. London Tramways Co.*,  
 [1893] 2 Ch. 588.

*E. Martin*, Q. C., and *D'Arcy Martin*, for the respon-  
 dents. It is admitted that there is no special restriction  
 applicable to the defendant company, and that it is only if  
 the defendant company comes within the prohibition of  
 section 1 of R. S. O. ch. 203, that the running of the cars  
 on Sunday can be stopped. The case is very much the  
 same as that of *Attorney-General v. Niagara Falls  
 Tramway Co.*, 19 O. R. 624, 18 A. R. 453, and that case  
 governs this one. The Court there refused to restrain  
 the company from running its cars on Sunday, because,  
 although there was no direct permission to run the  
 cars on that day, it was not shewn that any injury or  
 inconvenience to the public had resulted. Even if the de-  
 fendants are violating the provisions of section 1 of R. S. O.  
 ch. 203, an action of this kind in the name of the Attorney-  
 General is not the proper mode of procedure: *Attorney-  
 General v. Sheffield Gas Co.*, 3 D. M. & G. 304; *Attorney-  
 General v. Shrewsbury Bridge Co.*, 21 Ch. D. 762; *London,  
 Brighton and South Coast R. W. Co. v. Truman*, 11 App. Cas.  
 45. But the defendants do not come within the Act at all.  
 It is quite too late now to contend that the words "other  
 person whatsoever" can be construed in the general sense  
 which they would bear if they were not used in connection  
 with the preceding specifically named classes of persons.  
 To give effect to the contention of the appellants would  
 mean the overruling of a long line of decisions upon the  
 Act. Then the defendants come within the exception  
 as to conveying travellers. At any rate *primâ facie*

**Argument.** they come within that exception, and the onus is on the appellant to prove that the persons carried were not travellers. Under the restricted construction of that word contended for by the appellant one would have to be a Mungo Park or a celebrity of that kind to make the definition applicable. The argument based upon the meaning of the word as used at the time of the passing of the original statute is entirely fallacious. The statute has been re-enacted from time to time in the different revisions down to the year 1887, and the Legislature must be presumed to have used the word in the wider and more comprehensive sense which it has in modern times obtained. A man may well be termed a "traveller," although he never leaves the place in which he has been born. The term "city traveller" is a well-known one to define a person who travels about a particular city or town taking orders for his employers. Any man is a traveller who moves from one point to another, no matter how short the distance. It is impossible to draw the line, and practically the word is used as the equivalent of "passenger." It is true that the cases decided under the Licensing Acts do not afford very much light as to the interpretation of the present enactment, but so far as they go they are in favour of the contentions of the respondents. It is clear from the elaborate definitions given in those Acts that without some restriction every person who chose to walk a yard or two to an ale-house would be looked upon as a traveller. To avoid the absurdity the Acts provide that a journey of a certain distance must be performed before a person can be considered a traveller for the purposes of that legislation. It is admitted, too, that the cars are to some extent used by persons arriving at Hamilton by train. It can not be contended that such a person is not a traveller before he reaches Hamilton, and how can it be said that he ceases to be a traveller because when he reaches Hamilton he uses a street car to go to his home or his hotel? *Regina v. Daggett*, 1 O. R. 537, is a clear authority in favour of the respondents, and, having stood unquestioned for so many years, should not

now be interfered with. That decision is inconsistent with Argument. the earlier case of *Regina v. Tinning*, 11 U. C. R. 636, and should be followed in preference to it, and the cases cited in the judgment are also directly in point. The evidence as to any injury to property is of the vaguest description, and there is certainly nothing in the case to justify a declaration that the running of the cars is a nuisance or to give the Attorney-General a right to interfere on any ground of that kind.

*Moss*, Q. C., in reply.

March 2nd, 1897. BURTON, J.A. :—

This is an appeal from a judgment of Mr. Justice Rose, holding that the defendant company, who own and operate a street railway in the city of Hamilton, do not come within the meaning of the words "or other person whatsoever," as found in the first section of what is generally known as the Lord's Day Act, originally passed in 1845, and entitled "An Act to prevent the profanation of the Lord's Day, commonly called Sunday," and now to be found in the Revised Statutes as ch. 203.

Unfortunately, the decisions in England under the statute of 29 Car. II., for a similar purpose, afford us but little assistance in the construction of our statute. Had the language of our statute followed precisely section 5 of the statute of Charles, the question would have been free from doubt, and the decision in *Sandiman v. Breach*, 7 B. & C. 96, decided in England in 1827, and the reasoning of that judgment, which is in conformity with a long course of decisions, would shew that the maxim of *ejusdem generis* would clearly apply.

Our Legislature did not, however, adopt that section, but after adding "merchant" to the enumerated persons who are forbidden to do or exercise any worldly labour, business or work, of their respective ordinary calling, upon the Lord's Day, makes this exception—"conveying travellers or Her Majesty's mail, by land or by water, selling

**Judgment.** drugs and medicines, and other works of necessity and  
**BURTON,** works of charity only excepted."  
**J.A.**

Now this exception was clearly unnecessary as regards the persons specifically enumerated. No one would expect the carrying of travellers or conveying Her Majesty's mails to fall within the ordinary work or calling of a merchant, tradesman, artificer, mechanic, workman or labourer, and counsel for the appellant, therefore, contended that a wider construction should be given to the words "other person whatsoever," than they should receive if they were found in connection with the specific persons named without other qualifications or exception. There is much force in the contention, and I was at first inclined to think that in order to make the whole section consistent and intelligible the words should receive a wider construction and apply to all persons, including corporations having an ordinary calling.

I am satisfied, however, upon further consideration, that we cannot come to such a conclusion without in effect overruling a line of decisions which have prevailed in the Courts for over a century.

It must be borne in mind that the Legislature must be presumed to have been aware of this line of decision when they passed the Act, 8 Vict. ch. 45; and if they then intended to embrace every description of persons and every species of business in the ordinary calling of such persons, it would not have been necessary still to retain the specific enumeration of several classes of persons exercising particular descriptions of labour or business similar to those enumerated in the statute of Charles. It would have been sufficient to say in general terms that no person whatever should do any work or business in his ordinary calling on the Lord's Day; but this is made more clear when we find that the Legislature did decide to add to the enumerated classes "merchants." Here again the object could have been attained by striking out the enumerated classes and extending the section to all persons; but when we find them adding "merchant," by that description, to the other enumerated classes,

followed by the words in question, it leads, I think, to the irresistible conclusion that a merchant would not be included in the words "or other person whatsoever," but that those words must, according to the general rule that preceding particular words control subsequent general words, be construed to mean persons *ejusdem generis* with those already mentioned, all of whom exercised an ordinary calling, and that if a carrier, and perhaps *a fortiori* a corporation carrying on the business of a carrier of passengers, were intended to be included in the prohibition, they would have been specially mentioned in the same way as a merchant has been mentioned.

Judgment.

BURTON,  
J.A.

It is not within our province to determine the wisdom or expediency of the law; and although it may in the opinion of many persons be considered desirable that other secular concerns besides those expressly mentioned in the statute should be comprehended in it we must be careful not to extend the words of the statute beyond their natural import; to do so would be to legislate and not to interpret the law as we find it.

It may be that the Legislature may consider it desirable that all persons having an ordinary calling shall not do any labour, business or work of that ordinary calling on Sunday—if so, it is easy for them so to declare—but this is a penal enactment, and any infraction of it subjects the party infringing it to a penalty; we ought not, therefore, to hold any person to come within the first section unless it is clear to our minds beyond any reasonable doubt that he is intended to be included.

But the Act contains internal evidence that it was not intended to include corporations, for in the 14th section, dealing with penalties, it is provided that the party offending may in default of payment of the fine imposed be committed to the common gaol for any term not exceeding three months, and the form of conviction in the schedule to the Act is to the same effect.

I think it impossible, therefore, to hold that the learned Judge was wrong when he held that the defendants were not within the words "other persons whatsoever."

Judgment.

BURTON,  
J.A.

This renders it unnecessary to decide the meaning of the word "travellers" as found in this Act. I think it worse than useless to refer to the interpretation of the word as found in the decisions in England under the Ale-House Acts.

Those Acts were passed *alio intuitu* and can afford us no assistance in arriving at the meaning to be attributed to the word under our statute.

I think, finding the word in connection with the carrying the Royal mail, and described as *inter alia* a work of necessity, there ought to be no difficulty in ascertaining what was intended. I agree with so much of the judgment pronounced so many years ago by Sir John Robinson, delivering the decision of the Court of Queen's Bench, as defines the word "travellers" as used in this Act, and think it sound law to-day as it was then: *Regina v. Tinning*, 11 U. C. R. 636.

Opinions may differ as to these statutes, some being of opinion that the statute of Charles is wholly unsuited to the present age, whilst others are of opinion that our Act is "a useful and salutary enactment." But we cannot overlook the fact that in the time of Charles travelling upon Sunday was illegal, so that there could be no recovery for any injury sustained in the course of the journey; and although our Act is not so stringent in its provisions, still its promoters had in view the prevention of what they deemed a profanation of the Lord's Day, and excepted only such conveying of travellers as came within the meaning of a work of necessity.

How any one could hold that excursionists, either to the Island or any where else, came within the definition of "travellers," within the meaning of the framers of our own Act—to use the very expressive, but not perhaps very judicial, language of Lord Bramwell—"beats me."

It was said in the case (*Regina v. Daggett*, 1 O. R. 537), in which that was so held that *Regina v. Tinning*, 11 U. C. R. 636, was decided before the subsequent cases which are referred to in that judgment.

The application of cases decided under the English Ale-House Acts to an Act of this nature, is most misleading, but none of them in the slightest degree conflict with the judgment of Sir John Robinson in *Regina v. Tinning*, 11 U. C. R. 636, and obviously have no bearing in construing the exception of what is regarded as a work of necessity in the present Act, passed for the purpose of preventing what, in the opinion of its framers, was regarded as a desecration of the Sabbath.

I am of opinion, therefore, that the appeal should be dismissed, and the judgment below affirmed.

Judgment.  
BURTON,  
J.A.

OSLER, J.A. :—

I am of opinion that the judgment of my learned brother Rose should be affirmed. We must assume that when the Provincial Legislature, in 1845, passed the Act, 8 Vict. ch. 45, now R. S. O. ch. 203, they were not ignorant of the course of decisions upon its English prototype, 29 Car. II. ch. 7, by which the words "or other person whatsoever" had been uniformly construed to refer to persons *ejusdem generis* with those already named. Had the Legislature intended to make the new enactment all-embracing, the obvious and simple way to effect that purpose was to have refrained from enumerating any particular classes who should come within it, and then adding to the general prohibition the exception as it now appears in the first section of the Act. So far, however, from adopting this method the Legislature added another member, viz., "merchant," to the already enumerated classes, thereby, as it were, emphatically adopting the construction which had been placed upon the general words, and declaring that merchants would not have been included therein; thus depriving the exception, as it appears to me, of the weight or force it might otherwise have had in inviting a construction of the provincial Act different from that which had been placed upon the Act of Charles. Section 14 possibly aids the argument that corporations are not within the



Judgment.

OSLER,  
J.A.

Act. I do not lay much stress upon it. I refer to *Sandiman v. Breach*, 7 B. & C. 96; *Regina v. Cleworth*, 4 B. & S. 927, in which it was held that a farmer was not within the Act, a case not, I think, cited in the argument, and *Hespeler v. Shaw*, 16 U. C. R. 104.

I am therefore of opinion that an incorporated company, or other person, operating street cars upon a Sunday is not within the prohibition of the Act, and, disposing of the case upon this ground, it seems unnecessary to offer any opinion as to the meaning of the word "travellers" as used in section 1 of the Act. I wish to be understood as at present not concurring in any way in the observations which have been made in reference to that word upon *Regina v. Daggett*, 1 O. R. 537, and upon that branch of my brother Rose's judgment which deals with it. The case is eminently one in which it is undesirable to express an opinion upon any point not absolutely necessary to be decided.

MACLENNAN, J. A. :—

I think, for the reasons given by my brother Burton, that the Act does not apply to a corporation.

*Appeal dismissed.*

R. S. C.

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## WASHINGTON

## V.

## THE GRAND TRUNK RAILWAY COMPANY OF CANADA.

*Railways—Negligence—Packing of Railway Frogs—Workmen's Compensation for Injuries Act—55 Vict. ch. 30, sec. 5, sub-secs. 2 and 3 (O.)—Statutes—Construction—Division into Sections—51 Vict. ch. 29, sec. 262, sub-secs. 3 and 4 (D.).*

Sub-section 3 of section 262 of the Railway Act, 51 Vict. ch. 29 (D.), provides that the spaces behind and in front of every railway frog shall be filled with packing. Sub-section 4 of the same section provides that the spaces between any wing rail and any railway frog, and between any guard rail and track rail, shall be filled with packing, and this sub-section ends with a proviso that the Railway Committee may allow "such filling" to be left out during the winter months:—

*Held*, that this proviso applied to both sub-sections and that permission having been given by the Railway Committee to frogs being left unpacked during the period in question the defendants were not liable for an accident resulting from that cause.

The provisions of sub-sections 2 and 3 of section 5 of the Workmen's Compensation for Injuries Act, 55 Vict. ch. 30 (O.), as to packing railway frogs, are not binding upon railways under the legislative control of the Dominion.

Judgment of STREET, J., reversed.

THIS was an appeal by the defendants from the judgment of STREET, J. Statement.

The following statement of the facts and arguments is taken from the judgment of OSLER, J. A:—

The plaintiff was a yardsman in the employment of the defendants, and on the morning of the 16th of January, 1896, was engaged in coupling cars, forming part of a freight train, in the defendants' yard at Hamilton. While coming out from between two cars which he had just coupled his foot caught in a frog, or between a wing rail and frog rail, and he was thrown down, a car passing over and severing his right arm.

The grounds of negligence alleged, so far as material to be stated, are:

(1) That the defendants had neglected to pack the space between the rails in the railway frog over which the cars were passing, and in which the plaintiff's foot was caught, as required by the Workmen's Compensation for Injuries Act;

**Statement.**

(2) Neglect to observe a similar provision in the Dominion Railway Act, 51 Vict. ch. 29 ; and

(3) Defect in the condition or arrangement of the ways, works, machinery, plant or premises connected with or intended for or used in the defendants' business, the defect being the non-packing of the frog.

Besides denying negligence, the defendants pleaded that they are a railway company under the legislative authority of the Parliament of Canada, and that the Railway Committee of the Privy Council, in pursuance of the powers conferred upon them by section 262 of the Dominion Railway Act, by order in council made in November, 1889, ordered, allowed or directed that the defendants should be at liberty to leave out or omit the packing or filling of frogs and the spaces between wing rails and frogs, and between guard rails and fixed rails from the month of December to the month of April in each year, and that such order should be permanent unless and until withdrawn by the Committee ; that the said order is still in force, and that the accident the plaintiff suffered from happened between the months of December and April when for the reason aforesaid the packing was lawfully left out of the frog, etc.

Reply ; that the Railway Committee had no power to dispense with the filling of the frog.

At the trial before STREET, J., the following questions were left to the jury :

1. Was the plaintiff's foot caught in the frog or between the wing rail and the frog rail ?
2. Were the defendants guilty of any negligence which led to the accident ?
3. If so, in what did such negligence consist ?

The jury answered that the plaintiff's foot was caught in the frog ; that the defendants were guilty of negligence in not having the frog packed or protected ; and they assessed the damages at \$2,500, for which sum the judgment now appealed from was directed.

The defendants contend (1) that whether the plaintiff's foot was caught in the unpacked frog or in the unpacked

space between the wing rail and the frog rail, they are absolved from liability by the order in council (which was duly proved) made on the 19th November, 1889, which purports to relieve them from the obligation to pack the frog or the space referred to at the time when the plaintiff met with the accident; (2) that if the power of the Railway Committee under section 262 was limited to allowing the filling to be left out between the wing rail and the frog, and the guard rail and the track rail along side of it, but not the spaces behind and in front of the frog, then that the evidence shews that the plaintiff's foot was caught, not in the frog, but between the wing rail and the frog rail, which space the defendants were by the order in council lawfully excused from packing; and (3) that the damages were excessive, the plaintiff being restricted by section 7 of the Workmen's Compensation for Injuries Act to a sum equivalent to the estimated earnings during the three years preceding the injury "of a person in the same grade employed during those years in the like employment, or the sum of \$1,500, whichever is larger," the latter sum being upon the evidence the maximum in the present case.

Statement.

The appeal was argued before BURTON, OSLER, and MACLENNAN, JJ. A., on the 24th of November, 1896.

*McCarthy*, Q. C., for the appellants.

*G. Lynch-Staunton*, for the respondent.

March, 2nd, 1897. OSLER, J. A. :—

Apart from the question of fact, the case turns, in my opinion, upon the proper construction of section 262 of the Dominion Railway Act of 1888.

In *Monkhouse v. Grand Trunk R. W. Co.*, 8 A. R. 637, it was held that the provisions of the Railway Accidents Act, 44 Vict. ch. 22 (O.), R. S. O. ch 212, as to packing or filling frogs, guard rails and wing rails, applied to those

Judgment.

OSLER,  
J.A.

railway companies only which were within the jurisdiction of the Provincial Legislature, and not to Dominion railway companies. The corresponding enactments of the Workmen's Compensation for Injuries Act, 49 Vict. ch. 28, sec. 4 (O.), 55 Vict. ch. 30, sec. 5 (O.), must also, in my opinion, be confined in their application to the former class of railway companies, and for the same reason, namely, that they relate to the construction or arrangement of the railway track itself. This is consistent with our decision in the case of *Rowlands v. Canada Southern R. W. Co.*, 30 June 1889, approved in *Canada Southern R. W. Co. v. Jackson*, 17 S. C. R. 316, where it was held that railway companies of both classes, just as other corporations or individuals within the Province, were subject to other provisions of the Workmen's Compensation for Injuries Act, dealing with the general law of master and servant, and giving their servants a right of action against them under certain circumstances for injuries arising from the negligence of fellow servants.

As the jury have expressly found that the only negligence of the defendants was the omitting to pack or protect the frog, we are not embarrassed with any question as to the application in other respects of the Workmen's Compensation for Injuries Act, and whether the damages should be limited to the maximum sum recoverable in cases to which the Provincial Acts apply. There is a curious discrepancy in this respect between section 8 of the Railway Accidents Act, R. S. O. ch. 212, which limits the damages to a sum equivalent to the estimated earnings for three years of a person in the same grade of a like employment and section 7 of the Workmen's Compensation for Injuries Act, 55 Vict. ch. 30 (O.), which limits them to that sum, "or to \$1,500 whichever is larger."

In *Lemay v. Canadian Pacific R. W. Co.*, 17 A. R. 293, (where the accident happened in the month of October) we held that by force of section 289 of the Dominion Railway Act a right of action was given to the "person injured" by reason of failure on the company's part to comply with the provisions of section 262 even though the default might

have been owing to the negligence of a fellow servant of such parties. The case did not turn upon any of the provisions of the Workmen's Compensation for Injuries Act.

Judgment.  
OSLER,  
J.A.

Assuming then for the present that the plaintiff's foot was caught in the frog, as the jury have found, the question is whether section 262 empowered the Railway Committee to make, as they in fact did, an order to relieve the defendants from the obligation otherwise imposed upon them by that section of keeping the frog packed from the month of December to the month of April, both months inclusive.

If the section does confer that power, the plaintiff cannot recover as he met with the accident in January. The answer to the question depends upon whether the proviso at the end of sub-section 4 of section 262 is limited to that sub-section or extends also to sub-section 3.

The first clause of the section defines the extent of its application. It shall apply "to every railway and railway company within the legislative authority or jurisdiction of the Parliament of Canada." Then follows the second clause or sub-section, which interprets the meaning of the word "packing," and prescribes the manner in which it shall be done: "In this section the expression 'packing,' means a packing of wood or metal, or some other equally substantial and solid material, of not less than two inches in thickness, and which, where by this section any space is required to be filled in, shall extend to within one and a half inches of the crown of the rails in use on any such railway, shall be neatly fitted so as to come against the web of such rails, and shall be well and solidly fastened to the ties on which such rails are laid." Sub-section 3: "The spaces behind and in front of every railway frog or crossing, and between the fixed rails of every switch where such spaces are less than five inches wide, shall be filled with packing up to the under side of the head of the rail." Sub-section 4: "The spaces between any wing rail and any railway frog, and between any guard rail and the track rail along side of it, shall be filled with packing at

Judgment.

OSLER,  
J. A.

their splayed ends, so that the whole splay shall be so filled where the width of the space between the rails is less than five inches; such packing not to reach higher than to the under side of the head of the rail." Then follows the proviso in question: "Provided, however, that the Railway Committee may allow such filling to be left out, from the month of December to the month of April in each year, both months included." The section ends with sub-section 5, which makes provisions respecting oil cups or other appliances used for oiling the valves of a locomotive.

The question presented is not free from difficulty. Had the proviso been found at the end of the section, or had it formed a separate paragraph or a section by itself, or had the two sub-sections formed but a single sub-section, there is nothing in the enacting clauses themselves, which would have justified us in restraining its generality or in holding it less applicable to the one than to the other.

In the Interpretation Act, R. S. O. ch. 1, sec. 4, it is enacted that in the framing of a statute, after the preamble and enacting clause, "the various clauses of the statute shall follow in a concise and enunciative form." There is nothing that I am aware of which makes it necessary that such clauses shall be divided into numbered sections, or which declares what shall constitute a section or sub-section of an Act; and although we may, I presume, take notice that the separation of the clauses into numbered sections is no longer, as it formerly was, the work of the printer, but is done either when the bill is introduced, or by the parliamentary officials, when it is passing through the House, the principle of construction still prevails, stated by Little-dale, J., in *Rex v. Newark-upon-Trent*, 3 B. & C. 59 at p. 63: "The division of an Act of parliament into sections is an arbitrary thing, forming no part of the Act, and ought not to furnish any rule for interpreting any clause. The only proper way to interpret any sentence is to look at the language of the sentence itself; and the connection it has with the other enactments, without any reference to a division into sections."

And Holroyd, J., in the same case, says (p. 71): "In the construction of a statute, the question whether a proviso in the whole or in part relates to, and qualifies, restrains, or operates upon the immediately preceding provisions only of the statute, or whether it must be taken to extend in the whole or in part to all the preceding matters contained in the statute, must depend, I think, upon its words and import, and not upon the divisions into sections that may be made, for convenience of reference in the printed copies of the statute."

Judgment.

OSLER,  
J.A.

And, referring to the case before him, he adds: "The same construction must prevail, I apprehend, in this case, as if the proviso, which has been printed as if incorporated in the second section, had been, as I think it might with as much or more propriety have been, separated therefrom and made into a different section."

I refer also to *Cohen v. South Eastern R. W. Co.*, 2 Ex. D. at p. 260; *United States v. Babbitt*, 1 Black 55, and to *Ex parte Partington*, 6 Q. B. 649, where, upon the construction of the whole section, a proviso was limited to the cases mentioned in the preceding parts of the section to which it was appended.

There being, therefore, nothing in the provisions of section 262, so far as its language enables us to judge, or so far as the evidence in the case explains the subject dealt with by it, which shews that any absurdity or inconvenience would follow from holding that the proviso at the end of the three sub-sections relating to the packing of spaces between rails, applied to both the enacting clauses on the subject, I think we are compelled to hold that it does so apply, and therefore, the packing having been lawfully omitted at the time when the plaintiff met with the accident, that he cannot recover. Were we at liberty to refer to Ontario statutes on the subject, or to what occurred in Parliament when the bill was in committee, it is possible that the case would admit of a different view being taken of it, but these are not admissible aids to the construction of the Act: *Smiles v. Belford*, 1 A. R. 436; *Hardcastle*, 2nd ed., p. 142 *et seq.*



Judgment.

OSLER,  
J.A.

There is a difference between the provisions of the Ontario statutes and the Dominion Act as to the time during which the packing may be omitted. In the former it must not be omitted from April to October, both inclusive. In the latter it must be maintained from May to November, both inclusive—seven months in each, though not the same period. The Ontario Acts require it to be in in April and allow it to be omitted in November; while under the Dominion Act it may be out in April, though in November it must be in.

On the question of fact, whether the plaintiff's foot was caught in the frog or between the wing rail inside the track and the frog rail, the evidence in my opinion supports the finding of the jury. [The learned Judge then discussed the evidence and continued:]

For the reasons, however, already given, the appeal must be allowed, and the action dismissed. If the defendants press for them, costs must follow in the usual way.

MACLENNAN, J. A.:—

There are two questions in this appeal; first, whether the jury rightly found that the plaintiff's foot was caught in the space behind the frog or crossing of the railway track, or in the space between the wing rail or guard rail and the track rail. The jury found it was in the frog, and I think there is ample evidence to support their finding.

[The learned Judge discussed the evidence and continued:]

This question was only material because the plaintiff contended that while the defendants might be excused for not having the wing rail space packed they were bound to have the frog packed, having regard to the Railway Act of 1888, section 262. That section requires the company to pack not only the frog spaces, but also the spaces between the wing and guard rails, and the track rail. The defendants proved and relied upon a dispensation from the Railway Committee for the five winter months, as provided

in sub-section 4, the accident having occurred in January. Judgment.  
 Mr. Staunton argued that the authority of the proviso did not extend to the frog space, but only to the wing and guard rail spaces; and that so far as the dispensation affected to apply to frog spaces it was unauthorized. That argument was rested upon the circumstance that the proviso is contained in and is part of sub-section 4, which relates only to the wing and guard rail spaces, and that therefore it could only be intended to apply to the latter. What the proviso says is, that the Railway Committee may allow such filling to be left out during the months named. The question then is, what is the filling referred to? With the exception of sub-section 5, the whole of section 262 is taken up with one subject, and one only, namely, the filling up of certain spaces with packing. The first sub-section makes it applicable to all Dominion railways and companies. Sub-section 2 defines packing and how and to what extent it is to be used in filling the spaces required to be filled. Sub-section 3 requires frog and switch spaces to be filled, and sub-section 4 directs the filling of the wing and guard rail spaces. Then comes the proviso enabling the Railway Committee to dispense with such filling. MACLENNAN,  
J.A.

I think we have no warrant whatever, merely because the proviso is contained in the same sub-section which imposes the duty of filling the wing and guard-rail spaces, to say that the words "such filling," do not also refer to the filling of the frog and switch spaces. I think the words *primâ facie* refer to all the filling mentioned in the section, and that if the Legislature had intended to restrict it, it would have done so by clear words.

I therefore think that although the plaintiff was caught in the frog space, the defendants were excused by the dispensation of the Railway Committee from having that packed, equally with the other spaces, and were, therefore, not guilty of negligence which caused the plaintiff's injury.

Judgment. The appeal must therefore be allowed, and the **action**  
**MACLENNAN**, must be dismissed.

J.A.

BURTON, J. A. :—

I am of the same opinion.

*Appeal allowed.*

R. S. C.

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ELLIS V. TOWN OF TORONTO JUNCTION.

*Municipal Corporations—Police Magistrate—Salary—R. S. O.*  
*ch. 72, secs. 5, 28.*

THIS was an appeal by the plaintiff from the judgment of BOYD, C., reported 28 O. R. 55, and was argued before BURTON, OSLER, and MACLENNAN, JJ. A., on the 10th and 11th of March, 1897.

*Raney*, for the appellant.

*Going*, for the respondents.

At the conclusion of the argument the appeal was dismissed with costs, the Court agreeing with the judgment appealed from.

R. S. C.

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ALDRICH V. CANADA PERMANENT LOAN AND SAVINGS  
COMPANY.

*Mortgage—Power of Sale—Negligence—Sale of Two Lots in One Parcel.*

A mortgagee who, under a power of sale, without previous enquiry of any kind, put up for sale by auction, and sold in one parcel a farm, and two shops in a village nearly three-quarters of a mile away, not in any way used together, was held liable for the difference between the amount realized and the amount which would have been realized had the farm and shops been sold separately.

Judgment of the Divisional Court, 27 O. R. 548, affirmed, BURTON, J. A., dissenting.

THIS was an appeal by the defendants from the judgment of the Divisional Court, reported 27 O. R. 548. Statement.

The action was brought to recover damages alleged to have been sustained by reason of the defendants having sold *en bloc* several parcels of land mortgaged to them by the plaintiff. The facts and arguments are stated in the report below.

The appeal was argued before BURTON, OSLER, and MACLENNAN, J.J.A., and FALCONBRIDGE, J., on the 9th of October, 1896.

*W. Cassels*, Q. C., and *G. A. McKenzie*, for the appellants.

*C. Macdonald*, for the respondent.

March 2nd, 1897. MACLENNAN, J.A. :—

I am of opinion that the judgment should be affirmed, and I cannot refrain from expressing my surprise that the defendants should have thought it right to put up two such different properties for sale in one lot. One was a farm of forty acres with two dwelling-houses, and other farm buildings thereon, valued in 1891 by the company's valuator for the purpose of the mortgage at \$7,000; the other a village property with two stores thereon, valued at the same time at \$3,800; and they were situate half a mile or more apart. It is obvious that the class of persons who would desire to buy the farm would probably not

Judgment. want the stores, and *vice versé*, and that by putting both  
MACLENNAN, up together the number of probable bidders was dimin-  
J.A. ished. I do not say that in no case like the present would  
a sale in one lot be proper. The circumstances might be  
such as to justify it, but I am clearly of opinion that such  
circumstances would have to be made clearly apparent in  
order to do so, and that nothing of the kind existed in the  
present case.

The duty of a mortgagee exercising a power of sale has been stated in many cases, some of which are referred to in the judgment. I think that duty is no where better or more clearly stated than it is by Kindersley, V.-C., in *Falkner v. Equitable Reversionary Society*, 4 Dr. 352. He says, at p. 355: "A mortgagee is certainly not a mere trustee; he stands in a very different position; he has his rights, viz., a beneficial interest in realizing the security so as to get his principal, interest and costs. It is true the Court will not allow him to exercise that right without a due regard to the interest of the mortgagor; and the interest of the mortgagor requires that the sale shall take place as beneficially for the mortgagor as if he were himself selling."

Two years later, in *Jenkins v. Jones*, 2 Giff. 99, at p. 108, Stuart, V.-C., said: "It is well settled that, though a mortgagee's power of sale confers a clear right, it must be exercised with a due regard to the purpose for which it is given. A mortgagee, with such a power, stands in a fiduciary character, and, unlike an ordinary vendor selling what is his own, he must take all reasonable means to prevent any sacrifice of the property, inasmuch as he is a trustee for the mortgagor of any surplus that may remain."

I think these statements of the law have not been qualified in any way by any of the numerous subsequent decisions, but that, on the contrary, they have been confirmed: see *Richmond v. Evans*, 8 Gr. 508; *Latch v. Furlong*, 12 Gr. 303; *Prentice v. Consolidated Bank*, 13 A. R. 69, in our own Courts; and *Warner v. Jacob*, 20 Ch. D. 220; *Farrar v. Farrars*, 40 Ch. D. 395. Mr. Cassels

cited and relied on the late case of *Kennedy v. DeTrafford*, in the Court of Appeal, [1896] 1 Ch. 762, as in some way qualifying the former decisions. In that case a mortgagee sold under his power to one of several tenants in common who had made the mortgage, the sale being for the amount of principal, interest and costs due on the mortgage. The other mortgagors claimed the benefit of the purchase, and also set up that the sale was invalid, and was in fact merely a redemption.

Judgment.  
MACLENNAN  
J.A.

In their judgments both Lindley and Kay, L.JJ., while declaring that a mortgagee is not a trustee for the mortgagor, recognize in the clearest terms the duty of the former to take proper care and precaution in the exercise of his power. At page 772, Lindley, L. J., expresses his view of the law thus: "A mortgagee is not a trustee of a power of sale for the mortgagor at all; his right is to look after himself first. But he is not at liberty to look after his own interests alone, and it is not right, or proper, or legal, for him, either fraudulently, or wilfully, or recklessly, to sacrifice the property of the mortgagor: that is all." Recklessly means carelessly, negligently, and if there be negligence and want of proper care and precaution and if that is followed by a sacrifice of the interest of the mortgagor, then according to all the authorities, the mortgagee is answerable for the loss and must make it good: *National Bank of Australasia v. United Hand in Hand Co.*, 4 App. Cas. 391, cited in the judgment.

Now I think it clear that the defendants did act carelessly and negligently in this case. Their agent, Bell, who had made the original valuation for the purposes of the mortgage, lived in the neighbourhood of the property, and had done so for many years, during which he had been engaged in real estate. In their advertisement of the intended sale he is named as the person to whom application might be made for further particulars.

The two parcels are particularly described in the advertisement with their respective buildings and improvements, but there is no statement as to whether the sale

**Judgment.** would be in parcels or in block ; a strange omission to  
**MACLENNAN,** my mind. Enquiries were made by intending purchasers  
**J.A.** of Bell, whether it was to be put up in one or more parcels, but he told them he had no instructions, and he says he had none in fact. He says he became aware of a number of persons who were prepared to bid for the properties separately ; and that if he had been asked by the company he would have recommended a sale in separate parcels. He says further, that if he were selling as owner, he would sell in separate parcels, and that as a prudent owner he would not think of selling them together, and expect to get the best price for them.

It is true that in cross-examination by Mr. Cassels on behalf of the company, he says he thinks that from the mortgagee's point of view a sale in block was a prudent thing. The only reason he gives for that is that the one property might have sold, and the other might not. He says Russell (the company's agent who came from the head office to conduct the sale), did not ask him any questions as to how the property would best sell, but that he, Bell, had asked Russell how it was going to be sold, and he said, in one block. He added : I asked him the reason, and he told me that was his instructions from head office, and that the danger in putting them up separately, to the mortgagees, was that they might get one reserved bid too high and the other too low, and the one too low would sell, and the other remain on their hands.

Now, I would have thought the very first thing the company would have done, would have been to make enquiry from persons acquainted with the property, and with the residents in the neighbourhood, how these properties were likely to be sold to the best advantage, whether together or in parcels. If they had made that enquiry, there would have been but one answer, and that would have been in favour of a sale in parcels. They made no enquiry whatever. They did not even ask their own agent, but instructions were issued from the head office that the sale should be

*en bloc*. We are told the reason for that, and if the reason is sufficient, the company must be acquitted of all blame.

Judgment.

MACLENNAN,  
J.A.

But I must say I think there is nothing whatever in that reason. A reserved bid is entirely a matter for the mortgagee. He may have a reserved bid or not as he pleases, and if he have one, he can make it whatever sum he chooses to name. In the present case he could put a reserve of a proportionate part of his debt on each property according to its value, or estimated value, or more or less than a proportionate part. If one sold, and the other did not, he could foreclose the other parcel for the remainder of his debt, or sell it afterwards under his power. The debt with interest and costs was about \$4,800. Bell tells us he himself was prepared to bid \$2,000 for the stores, and that he knew a man who was prepared to give \$4,100 for the farm.

They sold in a block for \$5,210. I think it is clearly made out by Bell's evidence alone, and it is greatly strengthened by the other witnesses, that the prudent and reasonable way to put this property up for sale was in parcels; that if the company had made any enquiry they would have learned that such was the proper and prudent way of doing so; and that they made no enquiry whatever.

I am of opinion that the reason given for not putting it up in parcels is wholly untenable; that they could have protected themselves perfectly by means of a reserved bid on each parcel, and if they for any reason thought it desirable not to allow one property to be sold without the other, a condition to that effect might have been made that they should not be bound to complete the sale of one parcel unless the other parcel was also sold.

I think the evidence is ample to support the assessment of the loss by reason of the defendants' negligence at \$1,300. I say nothing about the alleged suretyship of the plaintiff Mrs. Quick, who, it was alleged, was the owner of the stores, and joined in the mortgage merely as surety. I see no evidence of the alleged suretyship, nor is it



Judgment. shewn that the company had any notice or knowledge  
MACLENNAN, of it.

J.A.

I think that the appeal should be dismissed.

OSLER, J. A., and FALCONBRIDGE, J., concurred.

BURTON, J. A. :—

Upon the evidence in this case I think the learned trial Judge arrived at the right conclusion, and, with great deference, I think his judgment should not have been disturbed.

There cannot, I apprehend, be much difference of opinion as to the rights and liabilities of a mortgagee exercising a power of sale; he should in the first place adhere strictly to the terms of his power, and the sale must also be effected with proper discretion; and the sale must be conducted in such a way as to ensure the greatest advantage to all concerned. No complaint is made on the ground that the steps preliminary to the sale were not all properly taken. In fact the learned Judge has found that they were so taken, and that the sale itself was properly conducted. The sole question is, whether the company, having, under the circumstances in this case, put up the mortgaged property *en bloc* instead of separately, did so at their peril, and are liable, because in the opinion of several witnesses, who were examined at the trial, the property realized less than in their opinion it would have realized if sold in several lots. It is not pretended that the mortgagees did not act *bonâ fide*, nor is it suggested that there was any corruption or collusion on their part, or that the sale itself was at an under value so gross as to be in itself evidence of fraud.

In *Kennedy v. De Trafford*, [1896] 1 Ch. 762, at p. 772, Lord Justice Lindley, in referring to the judgment of the Vice-Chancellor of the Duchy of Lancaster, then before him on appeal, thinks that the Vice-Chancellor had been somewhat misled by some language which he had used in *Farrar*

v. *Farrars*, 40 Ch. D. 395, where he had said this (p. 411): "If in exercise of his power, he (the mortgagee) acts *bonâ fide* and takes reasonable precautions to obtain a proper price, the mortgagor has no redress, even although more might have been obtained for the property if the sale had been postponed." The learned Lord Justice then proceeds: "The Vice-Chancellor has come to the conclusion that reasonable precautions to obtain a proper price were not used. The reason why these words were added was this: A mortgagee is not a trustee of a power of sale for a mortgagor at all; his right is to look after himself first. But he is not at liberty to look after his own interests alone, and it is not right, or proper, or legal, for him, either fraudulently, or wilfully, or recklessly, to sacrifice the property of the mortgagor: that is all." And Lord Justice Kay uses this language in the same case (p. 774): "Any loan of money on mortgage is, between mortgagor and mortgagee, a simple matter of business. They contract between themselves as to what their mutual rights and obligations shall be in regard to that loan of money. The Court of Equity has persistently refused to find in that relation anything like fiduciary duty on the part of one to the other so long as the mortgage exists. I agree that if the mortgagee realizes the mortgage and receives more than enough to pay what is due upon it, then, with respect to the balance, he does stand in a fiduciary position \* \* . But, except that, so long as the mortgage lasts and the money is due, the mortgagee is not in a fiduciary position, with reference to his powers under that mortgage, to the mortgagor in any sense. I think the learned Vice-Chancellor in this case has treated a mortgagee as being subject to obligations and duties to the mortgagor which, according to my understanding of the law, do not exist at all."

Judgment.  
BUTON,  
J.A.

Here the mortgagor has entrusted the mortgagees with most ample powers to realize by a sale of the premises in any way they may think proper.

The mortgagees appear to have adopted all the proper means by advertising and other means to bring the inten-

**Judgment.**

**BURTON,  
J.A.**

ded sale to the notice of the public, and when they received no applications from intending purchasers, and no notice from Mrs. Quick or from Aldrich himself, of a wish to have the properties disposed of separately, they had to determine what was best in their own interests; and if in point of fact more could have been realized by selling the properties separately, it was surely as much the mortgagor's duty and his interest to find out who were likely to become purchasers of the properties, and if that had been done and been made known to the defendants, it is inconceivable that they would have persisted in arbitrarily refusing to accede to any reasonable request in that direction. The truth would seem to be that both Aldrich and Mrs. Quick were greatly embarrassed with executions in the sheriff's hands to such an amount as to deprive them of any personal interest in the property.

Mr. Justice Robertson seems to have been under a misapprehension as to Mrs. Quick being a surety to the knowledge of the defendants; it is at least doubtful whether she was surety at all, but I think it clear that whether she was or not the company were not aware of it.

If that had been the case, and any request had been made in a business way to the company and refused, it might have raised a strong inference against them that they were acting oppressively—more especially if any pains had been taken by the mortgagors to find purchasers of the separate properties. Had such a case been made, the complaint would have presented a very different aspect.

We have to consider the case as it presented itself to the defendants, and not by what witnesses now say that they would have been willing to pay for each separate parcel. If they had been put up separately the mortgagees would necessarily, for their own protection, have been compelled to place an upset price upon each property, and if that price had not been reached upon either property the sale would have proved abortive, and further expense would have been incurred.

But Aldrich himself admits that he did not know until

after the sale that there were persons willing to bid on the properties separately ; and he admits that some time before this sale the properties were advertised for sale *en bloc* by a second mortgagee.

Judgment.  
BURTON,  
J.A.

The fact remains that no representation was made to the company that the parties desired to have the properties put up separately—they contented themselves with speaking to Bell, who was a mere agent of the company for receiving applications, and who had no power to bind the company or control the sale in any way.

It is in evidence, and it is unfortunately so common that we might almost take judicial notice of it, that lands were not in demand, and it was very difficult to realize on a forced sale—these are all matters that must be taken into consideration in forming a judgment as to whether the company were exercising a reasonable discretion in acting as they did ; and when, in addition to this, we find that no remonstrance was made when Russell intimated his intention to put up the property *en bloc*, I think it impossible to say that the learned trial Judge was wrong in dismissing the action.

I think my brother Ferguson was misled by a passage he quotes from Mr. Fisher's work rather leading to the inference that the mortgagee was in a sense a trustee. I have shewn that that is not a true view of the law, and in the latest edition of Mr. Fisher's work that passage is omitted.

No doubt there was an impression at one time that that was so. Vice-Chancellor Stuart in one case states that Lord Eldon had said that the mortgagee was a trustee for the mortgagor in the exercise of the power. But that idea has long since been exploded, and so far have the authorities now gone that even when the mortgage is in the form of a trust for sale that is not a trust which the mortgagor can enforce, and the mortgagee is not thereby made a trustee for the mortgagor : *Kirkwood v. Thompson*, 2 H. & M. 392 ; *Locking v. Parker*, L. R. 8 Ch. 30.

I should be very sorry if anything said in this judgment

**Judgment.** should be interpreted by mortgagees as enabling them to disregard the rights of the mortgagor, and recklessly to sell the mortgaged premises; but mortgagors ought also to remember that in granting such a power it is a contract between them, and to be careful not to grant too large a power to him with whom they are dealing.

**BURTON,  
J.A.**

I do not think there is much difference of opinion between my learned brothers and myself as to the law; the question rather is as to whether the evidence establishes—not that the defendants acted fraudulently, for there is no pretence of that, but whether they wilfully or recklessly sacrificed the property of the mortgagor, they not being in any fiduciary position, but acting upon the contract existing between them.

Whilst guarding the interests of the mortgagor against reckless conduct we must be careful to do nothing which may interfere with the facilities for borrowing money or with the freedom of contracts.

For these reasons, I am of opinion that the appeal should be allowed and the judgment at the trial restored.

*Appeal dismissed, BURTON, J. A., dissenting.*

R. S. C.

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## BREESE V. KNOX ET AL.

*Bankruptcy and Insolvency—Chattel Mortgage given within Sixty Days Pursuant to Agreement given Prior to Sixty Days from Assignment—Statutory Presumption of Fraudulent Intent—54 Vict. ch. 20 (O.).*

Certain creditors, believing their debtor to be insolvent, but not desiring by taking a chattel mortgage to bring down upon him his other creditors, procured from him an agreement in writing to give, on default of payment or on demand, a chattel mortgage to secure the debt. About four months after, pursuant to the agreement, the debtor gave a chattel mortgage, within sixty days from the date of which he made an assignment for the benefit of his creditors :—

*Held*, that, notwithstanding the agreement, the Act 54 Vict. ch. 20 (O.), amending the Act relating to fraudulent preference by insolvent persons, applied, that the doctrine of pressure was not applicable, and that the fraudulent intent must be presumed.

THIS was an action brought by William Breese, as assignee for creditors of one Samuel Foster, against John Knox and Alfred Morgan, wholesale merchants carrying on business under the firm name of Knox, Morgan & Co., to set aside as void against him an assignment of book debts and a chattel mortgage covering the stock-in-trade of Foster, and made by him to the defendants, and dated November 9th, 1895, and November 11th, 1895, respectively, as preferential, Foster being in insolvent circumstances at the time of the execution thereof, etc., within a period of sixty days from which the assignment to the plaintiff was made. Statement.

In their statement of defence, besides denying the plaintiff's allegations of fact, the defendants further stated that on June 25th, 1895, Foster made an agreement with them to give them a chattel mortgage on his stock-in-trade, in the words and figures following :—

HAMILTON, June 25th, 1895.

To Messrs. Knox, Morgan & Co., Hamilton.

For valuable consideration, the receipt of which I hereby acknowledge, I hereby agree that in case at any time I make default in the payment of any sum which I may owe you, or in case at any time you demand the same, I will give you a good and sufficient chattel mortgage upon

**Statement.** all the stock-in-trade which I have at the time in my store premises at Chatsworth, including any goods that I may thereafter bring on said premises, and including all the store furniture, fixtures, fittings and utensils and horses and harness, wagons and sleighs, that I may have on said premises or elsewhere, to secure your claim against me at the time of such default or demand.

Witness my hand and seal.

Witness,

(Signed) WILLIAM LEES.

(Signed) SAMUEL FOSTER. (Seal.)

And the defendants alleged that the chattel mortgage in question, was given by Foster in good faith pursuant to his said agreement, and without any knowledge on their part that Foster was in insolvent circumstances and without any fraudulent intent.

The plaintiff replied that the said agreement was made with the intent of defeating, hindering, delaying, and prejudicing Foster's creditors other than the defendants.

The action was tried before STREET, J., at the Assizes at Owen Sound, on September 14th, 1896, without a jury.

*George Kerr*, and *R. W. Evans*, for the plaintiff.

*W. R. Riddell*, for the defendants.

September 18th, 1896. STREET, J. :—

In order to support the chattel mortgage from Foster to the defendants of November 11th, 1895, the defendants are driven to rely upon the agreement made by Foster with them on June 25th, 1895, to give them a chattel mortgage in case he should make default in his payment, or in case they should demand it of him.

The present case, however, appears to me to differ very materially from *Clarkson v. Sterling*, 15 A. R. 234, and *Lawson v. McGeoch*, 20 A. R. 464, upon which the defendants relied.

As the law is laid down in the English Court of Appeal in *Ex parte Kilner, In re Barker*, 13 Ch. D. 245, I am required to look at all the circumstances of the case to ascertain the reason why a promise to give a chattel mortgage was taken instead of taking a chattel mortgage at once.

Judgment.  
STREET, J.

My conclusion from the correspondence and evidence and the actions of the defendants, is that they believed Foster to be insolvent, "drying up," is the expression used by Mr. Knox in his depositions—and their travellers had not called on him for orders for several months before June, 1895.

They seem to have thought, however, that they would fare better by not pushing matters to extremities, and by pressing him for small monthly payments.

Had they taken a chattel mortgage in June, 1895, the result would have been to bring down upon him his other creditors; to avoid doing this, they took the agreement upon which they now rely.

In my opinion these circumstances are sufficient to make it impossible for them to uphold the agreement as being valid against his other creditors, and I, therefore, find in favour of the plaintiff with costs.

The statute 59 Vict. ch. 34 (O.), was referred to; it is far from clear in its language; but I am unable to find in it anything which declares that an agreement voidable for the reasons above set forth, is rendered valid by registration.

The plaintiff, before trial, abandoned any claim to the book debts.

The judgment will declare the agreement and chattel mortgage void as against the plaintiff, and will declare the defendants entitled to retain moneys collected, or to be collected by them upon the book debts assigned to them, and the defendants must pay the costs.

The defendants appealed to the Court of Appeal, and the appeal was heard before the second division composed



Argument. of BOYD, C., and FERGUSON and MEREDITH, JJ., on February 5th, 1897.

*W. R. Riddell*, for the defendants. The agreement to give a chattel mortgage, must, we admit, be an enforceable agreement: *Ex parte Burton, In re Tunstall*, 13 Ch. D. 102; *Ex parte Griffith, In re Wilcoxon*, 23 Ch. D. 69, 73-2. The chattel mortgage was given in pursuance of the agreement. The English cases are upon a different statute to ours, and are upon the question whether acts were acts of bankruptcy under the English Bankruptcy statutes.

*George Kerr* and *R. W. Evans*, for the plaintiff. No case has been cited in which an agreement such as the one here, has been held to support a chattel mortgage as sought in this case. The agreement was an agreement to prefer; and to allow it to stand, would overrule all decisions. Where such agreements have been held sustainable, they have amounted to an absolute promise to give a security. There must be an equivalent given: *Woodhouse v. Murray*, L. R. 2 Q. B. 634. See also *Ex parte Kilner*, 13 Ch. D., at p. 249. The agreement here is not a *bond fide* agreement out and out, but is contingent on the creditors' demand: *Ex parte Fisher, In re Ash*, L. R. 7 Ch. 636; *Ex parte Foxley, In re Nurse*, L. R. 3 Ch. 515. We refer also to *Ex parte Cooper, In re Baum*, 10 Ch. D. 313.

*Riddell*, in reply, referred to the judgment in *Hope v. May*, 24 A. R. 16, and rested his case on that, and on *Clarkson v. Sterling*, 15 A. R. 234; and *Lawson v. McGeoch*, 20 A. R. 464.

February 5th, 1897. BOYD, C.:—

The judgment must be affirmed. The learned Judge was right both on fact and law. The doctrine of pressure is not applicable to a case of this kind, where insolvency exists to the knowledge of both parties. No case has been cited in which a promissory agreement of this kind has been held to be validated by pressure. It would be a most

dangerous doctrine. But the agreement here does not provide for an extension of time, or fix any limit of time within which the mortgage is to be given. It is to be put in force in case at any time the creditors so demand. The scheme was to take the agreement and not enforce it for sixty days, and then say we have an agreement given more than sixty days back before any assignment for creditors, and we will now enforce it. A scheme of this kind cannot succeed. The object of the statute cannot be got over in this way.

Judgment.

BOYD, C.

FERGUSON, J. :—

I agree. I have conferred with some of the Judges of the first division of the Court of Appeal as to whether they have had such a point as this before them, and am informed that they have not.

MEREDITH, J. :—

I also agree, basing my judgment upon this, that the right conclusion to be drawn, from the whole evidence, is, that at the time when the agreement and mortgage were obtained, the debtor, to the knowledge of himself and his favoured creditors, the defendants, was hopelessly insolvent, and that the transaction took the form of an agreement to give, and, after the passing of the sixty days, the giving, of the mortgage for the purposes of evading the effect of sec. 1, ch. 20, 54 Vict. (O.), and of enabling these creditors to obtain the agreed security only if, and when, there was immediate danger of other creditors recovering, or obtaining something, out of the property; and the Courts are surely not bound to apply any equitable rule giving a retrospective effect to the mortgage, treating it as if made when the agreement was obtained, contrary to the real intention of the parties, in order to aid the creditors in their scheme to defeat the purposes of the Legislature expressed in the legislation mentioned.

A. H. F. L.

THE SCOTTISH, ONTARIO, AND MANITOBA LAND COMPANY  
V. THE CORPORATION OF THE CITY OF TORONTO.

*Municipal Corporations—Notice of Action—General Issue—Breach of Contract in not Supplying Pure Water—Inapplicability of Statutory Defences—35 Vict. ch. 79, secs. 28, 35 (O.)—41 Vict. ch. 41, secs. 1, 3 (O.)—R. S. O. ch. 73, secs. 1, 13, 14, 15.*

Action against a municipal corporation for not providing a proper supply of pure water for the plaintiffs' elevator according to agreement, and for negligently and knowingly allowing the water supplied by them to become impregnated with sand, which greatly damaged the elevator :—

*Held*, that the action was one for breach of contract, and therefore the statutory defences and the defence of want of notice of action, etc., under statutes giving the same protection as that given to justices of the peace in the execution of their duties were inapplicable.

Decision of ROBERTSON, J., affirmed.

**Statement.** UNDER an order made by MACMAHON, J., on December 18th, 1895, the point of law raised by the pleadings in this action was argued before ROBERTSON, J., sitting in weekly Court, on January 7th, 1896, whose judgment, setting out all the material facts, was as follows :—

February 12th, 1896. ROBERTSON, J. :—

The pleadings are as follows :—

1. The plaintiffs are a company incorporated in Ontario, for the purpose, amongst others, of holding and dealing in real property, and the defendants are a municipal corporation under the provisions of the Consolidated Municipal Act.

2. The defendants, for their own profit, undertook in consideration of the periodic payment to them by the plaintiffs of certain sums of money, which payments were made, to furnish the plaintiffs with pure and wholesome water for the purpose of supplying power to the plaintiffs' hydraulic elevator, situate in their building on Toronto street, in the city of Toronto, known as York Chambers.

3. The defendants negligently caused and allowed such water so furnished by them during six years prior to the commencement of this action, to be impregnated with sand

and such like deleterious matter held in suspension therein. Said water being in such condition to the knowledge of the defendants, was forced by them into the apparatus of the elevator, and so greatly damaged it that it became totally useless to the plaintiffs. The plaintiffs being bound by agreement with their numerous tenants to operate an elevator in their building had, therefore, necessarily to replace the elevator so injured by the negligence of the defendants with a new elevator at the reasonable and proper cost of \$2,000.

4. Previously to such replacement, the plaintiffs necessarily expended from time to time on the said elevator for repairing the damage so done by the defendants, the sum of \$554.

The plaintiffs claimed from the defendants, in respect of the damage occasioned as aforesaid, the sum of \$2,554.

By the statement of defence, the defendants pleaded that they were not guilty, and in the margin set out the following statutes: 35 Vict. ch. 79, secs. 1, 2, 3, 6, 11, 16, 25, 29, 35, 41, Public Act; 41 Vict. ch. 41, secs. 1, 2 and 3, Public Act; R. S. O. ch. 73, secs. 1, 13, 14, 15, Public Act.

The plaintiffs by their reply, alleged that as a matter of law, the defendants are not entitled to plead the general issue, or the following statutory pleas in the margin of the statement of defence set forth, namely: 35 Vict. ch. 79, secs. 28 and 35; R. S. O. ch. 73, secs. 1, 13, 14 and 15; 41 Vict. ch. 41, secs. 1 and 3.

Prior to March, 1872, water was furnished and supplied to the citizens of Toronto for domestic and other purposes by the Toronto Waterworks Company, and grave and frequent complaints having been made from time to time against the quality and supply thus furnished, and serious injury to property and to the city generally having resulted from an undue and insufficient service thereof, and after much treaty and negotiation between the city and the water works company, it having been found impossible to effect a satisfactory arrangement on behalf of the city,

Judgment.

ROBERTSON,  
J.

Judgment. the Legislature on March 2nd, 1872, passed an Act to  
ROBERTSON, authorize the corporation of the city of Toronto to con-  
J. struct waterworks in the city of Toronto (35 Vict. ch. 79).

By that Act the corporation of the city of Toronto by and through the agency of commissions, etc., were granted power to design, construct, build, purchase, improve, hold and generally maintain, manage, and conduct waterworks, and all buildings, matters, machinery and appliances therewith connected or necessary thereto in the city and parts adjacent.

The commissioners and their successors were declared by the said Act to be a body corporate under the name of the "Waterworks Commissioners of the city of Toronto," and were composed of five members, of whom the mayor of the city for the time being was *ex officio* one; and all powers necessary to enable such commissioners to build such works, were thereby conferred on them, as well as to purchase and after purchase to add thereto or otherwise deal with the waterworks of any other company; and to improve, secure, maintain and enlarge any of the said works from time to time as to the commissioners might seem meet, and to carry out all and every the other powers conferred upon them by the Act. And by the Act their duties and powers are set forth, and such powers included the right to enter on lands, appropriate streams, and make contracts, etc., etc., but such lands, privileges, and water ascertained, set out, or appropriated by them for such purposes, were thereupon and forever thereafter vested in the corporation of the city, etc. And all such waterworks, pipes, erections and machinery requisite for the undertaking, was likewise vested in and became the property of the city.

The commissioners and their clerks employed in their service, were to be sworn before a justice of the peace to the faithful performance of their duties; and they were obliged to keep books for the purpose of the recording the whole of their official proceedings, etc. And their powers as to the regulation of the distribution and use of the

water in all places, etc., and to fix the prices thereof and the time of payment, etc., and to fix water rates, and to enforce payment thereof, and, in fact, to do all things necessary for the carrying out the objects of the said Act were provided for. And by section 28 of the Act, it is declared that "The commissioners and their officers shall have the like protection in the exercise of their respective offices and in the execution of their duties, as justices of the peace now have under the laws of this Province."

And by section 35, it is declared that "If any action or suit shall be brought against any person or persons, for anything done in pursuance of this Act, the same shall be brought within six calendar months next after the act committed, or in case there shall be a continuation of damages, then within one year after the original cause of such action arising."

This Act was amended in several particulars, not necessary to be considered in this case, by 37 Vict. ch. 75 ; 39 Vict. ch. 64 ; and 40 Vict. ch. 39. In 1878, however, the council of the city having petitioned the Legislature for such legislation as would remove all doubts respecting the powers and duties, rights and privileges of the corporation, as respects the control and management of the waterworks under a committee of the council to be annually appointed, the Act 41 Vict. ch. 41, was passed by which (sec. 1) all the powers, duties, rights and privileges conferred upon, vested in and enjoyed and exercised by the waterworks commissioners under the several thereafter mentioned statutes, were to be deemed and taken as having become vested in the corporation of the city, on December 31st, 1877, when the waterworks commissioners, and the powers and duties thereof under the provisions of the said Acts, were determined and ceased, leaving the works to be controlled and managed by a committee appointed by the council from their own members ; and by section 2, all the acts done by the city and committee appointed up to the passing of said last mentioned Act (March 7th, 1878), from December 31st, 1877, in connection with the control and

Judgment.

ROBERTSON,  
J.

Judgment.

ROBERTSON,  
J.

management of the waterworks were confirmed. And by section 3, it is declared that "from and after the passing of this Act, the said corporation of the city of Toronto shall, have, hold, use, exercise and enjoy all the powers and duties, rights and privileges had, held and used, enjoyed and exercised by the 'waterworks commission for the city of Toronto,' under the provisions of the several statutes above mentioned prior to the 31st day of December, 1877, and hereafter in the reading and application of the said several statutes, 'the council of the corporation of the city of Toronto,' or 'council,' or 'corporation,' shall and may be substituted for the words 'the waterworks commission for the city of Toronto,' 'water commissioners,' 'commissions,' and 'commission,' where and whenever it may be necessary to carry out the intention of this Act."

The defendants, it will be observed, have, *inter alia*, pleaded the foregoing sections of the Acts referred to, as well as secs. 1, 13 and 14, and 15, of ch. 73, R. S. O. 1887—An Act to protect Justices of the Peace and others from Vexatious Actions.

And the questions involved are, whether the defendants can plead the general issue or the statutory defences, which are allowed to justices of the peace under the sections of ch. 73, above referred to.

These defences are—1st. That it is not expressly alleged in the statement of claim that the act complained of was done maliciously, and without reasonable or probable cause; 2nd. That the act complained of was done by the defendants in the execution of their office, etc., and this action was not commenced within six months next after such act was committed; 3rd. That notice of action was not given at least one month before action, etc.

In my judgment, taking into account the nature of the cause of action, which is for negligently causing and allowing water which defendants undertook to furnish to the plaintiffs for a good consideration, to be impregnated with sand and such like deleterious matter held in suspension therein, whereby the apparatus of the plaintiffs' elevator

became damaged, etc., it is not necessary to allege or prove malice, or that the defendants did so without reasonable or probable cause.

Judgment.  
ROBERTSON,  
J.

The statement of claim is, I think, not aptly worded, but since the Judicature Act, it is difficult to say what words are not sufficient, so long as it can be gathered from the statement of the plaintiffs' claim, what is really meant; but, as I understand the facts as disclosed, the plaintiffs mean to say that in consideration that the plaintiffs would pay to the defendants their charges for a proper supply of pure water, for the purpose of supplying power to the plaintiffs' hydraulic elevator situate in their building on Toronto street, known as York Chambers, the defendants undertook and agreed to supply the plaintiffs with such water; that in supplying such water, the defendants negligently caused and allowed such water so furnished by them during six years prior to the commencement of this action, to be impregnated with sand, and such deleterious matter held in suspension therein (said water being in such condition to the knowledge of the defendants), that it so greatly damaged the said apparatus of the plaintiffs' elevator, that the same became totally useless to the plaintiffs, etc.; whereby, etc.

It is not necessary then to such a state of things to allege malice, or that there was not reasonable or probable cause, etc. The action is really to recover damages for a breach of contract. I think, therefore, that the objection taken by the plaintiffs in regard to so much of the defence as seeks to set up this, is well taken.

Then, as regards notice of action. It was held in *Hodgins v. Corporation of Huron and Bruce*, 3 E. & A. 169, that a municipal corporation is not (like a public officer) entitled to a month's notice before action brought against it in respect of any act of the corporation. But the defendants here contend that they are entitled to enjoy all the rights and privileges had, held and used, enjoyed and exercised by the waterworks commissioners under the provisions of the several Acts above mentioned, in regard



Judgment. to the construction and management of the waterworks; and that, by sec. 28 of 35 Vict. ch. 79, the commissioners and their officers had the like protection in the exercise of their respective offices and in the execution of their duties as justices of the peace, etc. I do not think this helps the defendants. The action is for a breach of contract, and I do not think the commissioners, if they were in existence and had charge of the waterworks, etc., and had undertaken to supply the plaintiffs with water for the purposes alleged, and had failed in doing so by negligence or otherwise, would be entitled to notice of action.

ROBERTSON,  
J.

In *Ridgway v. Corporation of the City of Toronto*, 28 C. P. 579, the action was for an injury sustained by the plaintiff by reason of the negligent filling up of a drain by the commissioners, and which they had opened, by reason whereof it caved in, whereby the plaintiff was injured and recovered. Hagarty, C. J., reviewing the several clauses of 35 Vict. ch. 79 (O.), *inter alia*, said, at page 584: "Even if at any time an action would have lain against the commission for an injury like the present, we should gather from the wording of the last statute (41 Vict. ch. 41, sec. 1) (O.), that for the redress of a wrong done or suffered in the construction or management of the waterworks, the city corporation would stand in the place of the abolished commission." But the case went off really on the liability of the city for nonrepair of the street, although the work done which caused the injury to the plaintiff, was done by the commissioners, they doing it as the agents of the defendants, and although the objection was taken that notice of action had not been given, as was contended the 28th section of the Act entitled the commissioners to. See also *McCarthy v. Vespra*, 16 P. R. 416, and cases there cited.

In *Trotter v. Corporation of the City of Toronto*, 28 C. P. 574, the action was instituted by writ against the commissioners, and not the corporation of the city of Toronto, and afterwards it was ordered on the application of the plaintiff that the writ and all subsequent proceedings in the suit be amended by substituting the corporation of the

city of Toronto, for the waterworks commissioners, with all the rights of the said original defendants, and the amendment was made accordingly. The action was for the nonrepair of certain main pipes laid down in one of the streets for waterworks purposes by the commissioners, whereby the plaintiff's premises were injured, etc. The defendants (the city) pleaded that the original defendants were the waterworks commissioners for whom and with all the rights thereof, by Judge's order, the defendants were substituted, and the waterworks were constructed and the grievances complained of committed, after the passing of the C. S. U. C. ch. 126, and 35 Vict. ch. 79 (O.), and by virtue of such last mentioned Act, and in execution of the duties imposed on the said commission, and said grievances were occasioned by reason of the improper construction of said waterworks, in the first place, and not by any neglect of the defendants (the city), and that no notice of action was given either to the commissioners or to the defendants, as required by C. S. U. C. ch. 126, sec. 10. This plea was held good on demurrer.

Judgment.  
ROBERTSON,  
J.

Hagarty, C. J., in giving judgment, said, at page 577: "I am of opinion that the defendants have a right to answer the declaration by any plea forming a defence to the water commissioners against whom the action was commenced;" and he refers to section 28 of 35 Vict. ch. 79 (O.). The learned Chief Justice also refers to *Hodgins v. Corporation of Huron and Bruce*, 3 E. & A. 169, where it was decided that a municipal corporation is not entitled to notice. And he also referred to the peculiar state of the record, and says: "But when the abolition of the water company rendered it necessary for the plaintiff, either to commence a new action against the city, or apply to have the latter substituted as defendants, it was provided in the order that any defence available to the first defendants, should be equally so to the new defendants. Perhaps such a provision was unnecessary to insure such a right of defence." But the learned Chief Justice passed no opinion on the latter points, further than to intimate as above.

**Judgment.** Now that was a case where I think it was clear that notice of action would be necessary, certainly against the commissioners, if an action would lie against them, as to which there may be some doubt, as the 35 Vict. ch. 79, sec. 1, declares that the city "by and through the agency of commissioners, etc., may and shall have power, etc." On the whole, I do not think that in this action notice was necessary, for the same reason that is given in regard to its being unnecessary to prove malice, etc., nor on the authority of *Hodgins v. Corporation of Huron and Bruce*, 3 E. & A. 169, are the plaintiffs bound to commence their action within six months from the committing of the act complained of.

**ROBERTSON,**  
**J.**

On the whole, I am of opinion that in this action the defendants should plead in the manner required now by the practice prescribed by the Judicature Act, and not in the manner adopted here.

There must, therefore, be judgment for the plaintiffs on the reply to the defendants' statement of defence.

The defendants appealed to the Court of Appeal, and the appeal was argued before the second division, consisting of MEREDITH, C. J., and ROSE, and MACMAHON, JJ., on October 5th, 1896.

*Fullerton*, Q. C., for the defendants. If we were wrongdoers, it was in tort, not for breach of contract: *Pontifex v. Midland R. W. Co.*, 3 Q. B. D. 23. We contend that there was no contract, and that the pleading goes further than contract. The allegation is, that we damaged the elevator through our negligence. We supplied the water pursuant to our duty under the Act: 41 Vict. ch. 41 (O.), as interpreted in *Trotter v. The Corporation of the City of Toronto*, 28 C. P. 574, at p. 577; *S. C.*, 29 C. P. 365: see *per Wilson*, C. J., 29 C. P. at p. 375. The whole question is, whether the furnishing of the water was done in pursuance of a public duty; we contend it was.

*Mowat*, for the plaintiffs. The object of the legislation

was to give the commissioners the same benefit as justices of the peace. The intention was to protect the corporations as individuals, rather than the corporation. The Court should strain every point to favour the plaintiffs. We cannot imagine an action against the commissioners as a corporation. They had no property: *Ridgway v. The Corporation of the City of Toronto*, 28 C. P. 579, is distinguishable. I refer to Maxwell on Statutes, 2nd ed., p. 63. It is obvious this is a matter of breach of contract: *The Corporation of the County of Bruce v. McLay*, 11 A. R. 477, discusses some of the cases.

*Fullerton*, in reply. In putting the pipes and letting the water go there, we were carrying out the very object of the statute—if so, was not the intention of the law to be protected: *Selmes v. Judge*, L. R. 6 Q. B. 724; *Lyden v. McGee*, 16 O. R. 105.

[MEREDITH, C. J., referred to *Atkinson v. Newcastle and Gateshead Waterworks Co.*, 2 Ex. D. 441; L. R. 6 Ex. 404.]

*Mowat*, cited *The City of St. John v. Christie*, 21 S. C. R. 1.

January 25th, 1897. The judgment of the Court was delivered by

MEREDITH, C. J.:—

This is an appeal by the defendant from the judgment of Mr. Justice Robertson in favour of the plaintiff upon the points of law raised by the pleadings.

The pleadings and points of law raised, are fully set out in the judgment of the learned Judge.

I agree that the plaintiffs' action as set out in the statement of claim, is for breach of contract, and am of opinion that both upon principle and authority, none of the statutory defences set up is applicable or can be pleaded in such an action.

In *The Corporation of the County of Bruce v. McLay*,  
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Judgment.  
MEREDITH,  
C.J.

11 A. R. 477, it was decided that, although a registrar of deeds is an officer within the meaning of R. S. O. ch. 73, sec. 1, and therefore entitled to notice of action in cases to which that Act is applicable, the defendant, a registrar of deeds, who was sued for the county's share of the fees of his office which he had not paid over, was not entitled to notice of action, and the inapplicability of various sections of the Act to such an action, is clearly pointed out by the learned Judges who delivered the judgment of the Court.

In *Davies v. Mayor, etc., of Swansea*, 8 Exch. 808, the action was brought to recover damages from the defendants for their refusal to permit the plaintiff to complete certain works which he had contracted with them to construct for them, and the defendants pleaded the want of notice of action, relying upon the provisions of the Public Health Act, 11-12 Vict. ch. 63, sec. 39, which required notice of action for anything done or intended to be done under the provisions of the Act, and alleging that the Acts complained of were things done, or intended to be done by them under the provisions of the Act, but upon the argument of a demurrer to the plea, upon the ground that the Act did not apply to a contract of the kind sued on, but had reference to a tort or a quasi tort committed in the *bond fide* exercise of the powers conferred by it, counsel for the defendants admitted that the plea could not be supported.

In *The Midland R. W. Co. v. The Local Board for the District of Withington*, 11 Q. B. D. 788, referring to the argument that had been made that the action was brought on a contract, and that the provisions of the Public Health Act, 1875, sec. 264, which required notice of action to be given for anything done, or intended to be done or omitted to be done under the provisions of the Act, and limited the time for bringing the action to six months after the accruing of the cause of action, did not apply, the Master of the Rolls, though deciding that the action was not brought on a contract, said, at p. 794: "I think that where an action has been brought for something done, or

omitted to be done under an express contract, the section does not apply; according to the cases cited, an enactment of this kind does not apply to specific contracts," and it is manifest from the language used by him in distinguishing the case from one of the cases cited, that his opinion was that the Act did not apply in the case of implied contracts properly so called.

See also *Wallace v. Smith*, 5 East 115; *Davis v. Curling*, 8 Q. B. 286, per Wightman, J., at p. 293; *Palmer v. Grand Junction R. W. Co.*, 4 M. & W., at p. 766; *Garton v. The Great Western R. W. Co.*, E. B. & E. 837, 846; Addison on Torts, 7th ed., p. 787; Bullen and Leake's Precedents of Pleadings, 4th ed., 441.

The appeal must, in my opinion, be dismissed with costs.

A. H. F. L.

Judgment.  
MEREDITH,  
C.J.

## REGINA V. BONNAR.

*Crown—Administration—Will—Probate—R. S. O. ch. 59.*

Where a person possessed of real and personal estate dies leaving no known relatives within the Province, the Attorney-General on behalf of Her Majesty may maintain an action to set aside letters probate of that person's will, executed without mental capacity, and in that action may obtain an order for possession of the real estate; but a grant of administration should be obtained by a separate proceeding.

Such an action under the statute R. S. O. ch. 59 is not for the purpose of escheating but to protect the property for the benefit of those who may be entitled.

Judgment of ROBERTSON, J., affirmed.

**Statement.** THIS was an appeal by the defendant from the judgment of ROBERTSON, J.

The action was brought by the Attorney-General for Ontario, on behalf of Her Majesty, to have a will, dated the 19th of March, 1895, of one Julia Lynch set aside, as procured by the undue influence of the defendant, who was her medical attendant. She died on the 20th of March, 1895, possessed of real and personal property to a considerable extent, and by the will in question nearly all the property was given to the defendant.

He proved the will and took possession of the assets, and in addition to setting up a defence on the merits contended that the Crown could not maintain the action, and that the legatees were necessary parties.

The action was tried at Toronto, on the 6th, 7th, 8th, and 9th of May, 1896, before ROBERTSON, J. It was proved that the deceased was an unmarried woman; that her father and mother were dead; that they had three other children, all of whom had died intestate and unmarried; and that the deceased had herself stated that she had no relations. The other legatees consented to be added as defendants, but the learned Judge thought that it was not necessary to add them.

He held that there was undue influence and want of voluntary capacity, and set aside the will and the legatees.

He also held that Julia Lynch had died intestate and without leaving any known relatives within the Province, or any known relatives who could readily be communicated with, and that her estate had therefore become vested in Her Majesty in right of Her Royal Prerogative, or for the use of such persons as might appear to be ultimately entitled thereto according to the statute in that behalf. A reference was directed to the Master in Ordinary to take an account of the dealings of the defendant with the estate, and he was ordered to pay into Court, subject to further order, whatever sum might be found due. He was also ordered to deliver to the Attorney-General "all property, title deeds, papers, and documents in his possession, custody, or power, belonging to the estate, subject to the further order of the Court," and also to pay the costs. Statement.

The defendant appealed, and the appeal was argued before BURTON, OSLER, and MACLENNAN, JJ.A., on the 30th of November, and 1st of December, 1896.

*Johnston*, Q. C., and *A. B. Armstrong*, for the appellant. There is no right to maintain this action. R. S. O. ch. 59 and ch. 95, are appealed to, but those Acts do not apply if there is a will or if there are heirs. That the will has been procured by undue influence, is no answer, and there is not sufficient evidence of want of heirs: *University of North Carolina v. Harrison*, 90 N. C. 385. The will should not have been set aside without notice to the legatees. [The learned counsel then dealt with the facts, contending that there was mental capacity and no undue influence.]

*Watson*, Q. C., and *W. E. Raney*, for the respondent. As far as the technical objection is concerned, the case must be treated as if no will had been made, and enough has been proved to justify the intervention of the Crown under chapters 59 and 95. Letters probate having been issued, the Crown could not administer, and this necessitated an action in the present form. The defendant cannot object that the legatees are not parties. He represents



**Argument.** them, and is the person really interested. They are willing to be added if necessary. It is impossible on the evidence to support this will.

*Johnston, Q. C., in reply.*

March 2nd, 1897. The judgment of the Court was delivered by

BURTON, J. A. :—

We were all, I think, prepared at the close of the argument, to hold that the learned Judge had properly decided that the document relied upon by the defendant as the last will and testament of the deceased Julia Lynch could not be upheld.

But it was contended that the Attorney-General was not entitled to maintain the action, and the case stood over to enable us to consider the statutes bearing upon the question.

The only statute bearing upon the point with which we are at present concerned is R. S. O. ch. 59, sec. 8, sub-secs. 1 and 2.

Those sub-sections provide that where a person dies in possession of, or entitled to real estate in Ontario, intestate as to such real estate, without any known heirs, the Attorney-General may apply to the High Court for an order for the making of such enquiries as may be necessary to determine whether or not Her Majesty is entitled to any portion of the real estate of the deceased on account of his dying intestate, and without heirs; and, where so entitled to make such application, he may bring an action, either in his own name or in the name of Her Majesty, to recover possession of the real estate of the deceased, and shall be entitled to judgment and to recover possession, unless the person claiming adversely shews that the deceased did not die intestate, as to such real estate, or that he left heirs, or that some other person is entitled.

As regards the real estate of which Julia Lynch died

seized, these sub-sections seem very clearly to apply. The evidence shews that the deceased had no known heirs, either here or elsewhere, so that the Attorney-General was entitled to make an application for an order to make such enquiries as were necessary to determine whether or not Her Majesty was entitled to any portion of her real estate on account of her dying intestate and without heirs; that enquiry resulted in confirming the view that she had no known heirs. Under these circumstances, I think that the Attorney-General was entitled to bring an action to recover possession, and that there would be no answer to such an action, unless the defendant could establish the validity of the will under which he claims.

Judgment.

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BURTON,  
J.A.

It must be borne in mind that this proceeding does not seek to recover the land absolutely as escheated to the Crown for want of heirs, in which case I should agree with the contention of the defendant's counsel that the evidence was not sufficient to establish such a case. The legal presumption is that every person must have some heirs however remote, unless he was himself illegitimate; but it is not contended here that the land has escheated to the Crown; that was the case in the *University of North Carolina v. Harrison*, 90 N. C. 385, to which we were referred on the argument, and where it was, I should say very properly, held that the evidence was not sufficient to rebut the presumption.

This proceeding is a creature of the statute to enable the Attorney-General where there are no known relatives to take steps to protect the property for the benefit of those who may be the parties entitled.

This does no injustice to the persons who may eventually establish their title as heirs-at-law, as the Crown would hold the land or the proceeds for the benefit of the heirs.

But I think this is the extent to which the decree should go, and that the application for administration of the personal estate should be a separate proceeding.

Until the will had been declared void, no such applica-

**Judgment.** tion could be made, and it is only in the character of  
**BURTON,** administrator that the general account of the defendant's  
**J.A.** dealing with the whole estate can be obtained.

With this variation, confining the decree to the real estate, the appeal should be dismissed, and the appellant should pay the costs.

*Appeal dismissed.*

R. S. C.

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CAMPBELL V. MORRISON.

*Indemnity—Mortgage—Purchase Subject to Mortgage—Assignment of Right to Payment.*

The equitable obligation of a purchaser of land subject to a mortgage may be assigned by the vendor to the mortgagee, who may maintain an action thereon against the purchaser for recovery of the mortgage moneys.

Judgment of ROBERTSON, J., affirmed, BURTON, J.A., dissenting.

**Statement.** THIS was an appeal by the defendant Maloney from the judgment of ROBERTSON, J.

By mortgage dated the 20th of August, 1891, made in pursuance of the Act respecting Short Forms of Mortgages, the defendants Sarah Morrison and Samuel Morrison mortgaged to the plaintiff certain lands in the city of Toronto, to secure payment of twenty-five hundred dollars on the 20th of August, 1896, with interest in the meantime, payable half-yearly on the 20th of August and 20th of February, at the rate of six and a half per centum per annum. The mortgage contained the usual covenant for payment. In March, 1892, Sarah Morrison and the defendant Maloney entered into an agreement whereby she agreed to exchange the lands in question for lands belonging to Maloney, he by the agreement agreeing to assume and pay off the plaintiff's mortgage when it should become due.

By deed dated the 22nd of March, 1892, made in pursuance of the Act respecting Short Forms of Conveyances, Sarah Morrison, (her husband, the defendant Samuel Morrison, joining therein), conveyed the lands in question to Maloney in consideration of the exchange of lands, and the assumption by Maloney of the plaintiff's mortgage, that mortgage being stated to be part of the consideration for the conveyance. There was no covenant in this deed for payment of the mortgage, and it was not executed by Maloney. He then made in favour of Sarah Morrison a mortgage upon the same lands to secure the payment of \$600, balance of the consideration for the exchange, and in this mortgage there was an absolute covenant against encumbrances. Statement.

On the 10th of December, 1894, Sarah Morrison and Samuel Morrison assigned to the plaintiff all and every covenant, agreement and obligation of Maloney of any and every kind and nature whatsoever, whether expressed in the agreement for exchange hereinbefore referred to or in the deed to Maloney, or implied from any or all of the transactions between them; and also all obligation or obligations both legal or equitable, of Maloney to Sarah Morrison to pay, satisfy and discharge the plaintiff's mortgage, and to indemnify and save harmless Sarah Morrison and Samuel Morrison, or either of them, from the mortgage, together with all rights and claims whatsoever, which Sarah Morrison or Samuel Morrison had or might thereafter have against Maloney, to enforce payment thereof, and all benefit and advantage to be derived therefrom.

Maloney paid three gales of interest, but at the time of the assignment by the Morrisons to the plaintiff several gales of interest were over due, and the plaintiff had threatened to take proceedings upon the mortgage against the Morrisons.

This action was commenced on the 9th of September, 1895. The defendants, the Morrisons, did not appear or defend. Maloney contested his liability, his main defence being that the understanding at the time of the transac-

**Statement.** tion was that he was not to become personally liable to pay the mortgage.

The action was tried at Toronto, on the 19th of March, 1896, before ROBERTSON, J., who, after hearing a great deal of evidence, gave judgment against Maloney with costs.

Maloney appealed, and the appeal was argued before BURTON, OSLER, and MACLENNAN, JJ.A., on the 13th of November, 1896.

*Moss, Q. C., and W. J. Boland, for the appellant.*  
*J. M. Clark, for the respondent.*

This argument was devoted chiefly to a discussion of the evidence, and subsequently the Court directed that there should be a further argument as to whether, assuming that the obligation of Maloney to indemnify the Morrisons existed, it could be assigned by the Morrisons to the plaintiff, and this point was argued before the same Judges on the 13th of January, 1897.

*Moss, Q. C., and W. J. Boland, for the appellant.* The nature of the right to indemnity has been somewhat discussed in such cases as *British Canadian Loan Co. v. Tear*, 23 O. R. 664; *McMichael v. Wilkie*, 18 A. R. 464; *Walker v. Dickson*, 20 A. R. 96; *Fraser v. Fairbanks*, 23 S. C. R. 79. It is a mere personal right for the protection of the vendor, and cannot be assigned, even though the assignee may have personally some interest apart from the assignment: *Hill v. Boyle*, L. R. 4 Eq. 260. The right to assign cannot depend upon the position of the person to whom the obligation is assigned; it is either assignable generally or not at all. Moreover, in this case there was no right of action at the time the assignment was made. The covenantee had not been damnified and could transfer no right: *Sutherland v. Webster*, 21 A. R. 228. *Robinson v. Macdonnell*, 5 M. & S. 228, shews that a future possible benefit or right is not assignable. See also *Credit Foncier v. Lawrie*, 27 O. R. 498; *Canada Landed and National Investment Co. v. Shaver*, 22 A. R. 377.

*J. M. Clark*, for the respondent. The authorities clearly support the proposition that actual payment by the person to be indemnified, or even recovery of judgment against that person, is not essential to give a right of action. When it becomes evident that the liability will be enforced, the right arises : *Boyd v. Robinson*, 20 O. R. 404 ; *Mewburn v. Mackelcan*, 19 A. R. 729. Here the intention to enforce the liability had been made known before the assignment and the covenant to indemnify had been broken, so that the right of action was in existence and could be assigned. The right is referred to in *Walker v. Dickson*, 20 A. R. 96, as a chose in action, and no limitation should be placed on the right of assignment. Here the amount of the mortgage is part of the consideration for the purchase, and there is more therefore than the mere implied right of indemnity. The assignment too is made to the person who is entitled to payment, and the position is stronger than if the assignment had been made to a stranger. It is clear that if the plaintiff had sued the Morrisons, and they had paid the amount of the mortgage, they could have then in their turn recovered payment from Maloney. What has been done here avoids circuity of action and saves expense. The right to make such an assignment has been recognized in several cases, and now to hold in accordance with the appellant's contention would mean, in effect, overruling decisions that have stood for many years : *Re Cozier*, *Parker v. Glover*, 24 Gr. 537 ; *Canavan v. Meek*, 2 O. R. 636 ; *Ball v. Tennant*, 21 A. R. 602 ; *Irving v. Boyd*, 15 Gr. 157 ; *Boyd v. Johnston*, 19 O. R. 598.

*Moss*, Q. C., in reply.

March 2nd, 1897. OSLER, J. A. :—

The circumstances under which the defendant Maloney executed the deed seem to make it impossible, consistently with authority, to relieve him from the consequences. He must stand to whatever liability he has incurred thereby. On the other point (to which the re-argument was directed)

Judgment.

OSLER,  
J.A.

I must express the opinion that this Court is already too fully committed to the view that an action of this kind is maintainable to recede from it. *Ball v. Tennant* 21 A. R. 602, fully involved that decision, and so perhaps have other cases. We must leave it for a higher Court to determine which view is right. For my own part I am not inclined to enter upon an academic discussion of the question, and therefore simply give my vote for affirming the judgment.

MACLENNAN, J. A. :—

[The learned Judge stated the facts and analyzed the evidence, coming to the conclusion that Maloney's defence was not made out, and then continued :]

After I had prepared my judgment thus far, the Court directed the question of the assignability of the defendant's obligation to pay the mortgage to be argued, and that has been done. Ever since the decision in the case of *Irving v. Boyd*, 15 Gr. 157, by the late Chief Justice of this Court, then Vice-Chancellor Spragge, nearly thirty years ago, I think it has been considered as good law that such an obligation was assignable to the mortgagee. The actual point decided in that case was whether such an obligation could be reached by sequestration at the instance of the mortgagee for satisfaction of his debt compulsorily, without the authority or consent of the debtor; but in the course of his judgment, and as part of the *ratio decidendi*, that very learned Judge declared emphatically that he had "no doubt that the equity of the mortgagor to compel his assignee to pay, would pass by express assignment to the mortgagee." He added that such an assignment would not fall within the mischief of *Prosser v. Edmonds*, 1 Y. & C. Ex. 481, and that class of cases; and that it would simplify the remedy for the recovery of the mortgage money, giving a direct right of suit between the party to receive and the proper party to pay, and would create the privity which alone was wanting to make such a suit sustainable.

I think a deliberate statement of the law,' such as <sup>Judgment.</sup> that, by a Judge of very great eminence and experience, <sup>MACLENNAN,</sup> acquiesced in, and never questioned, so far as I am aware, <sup>J.A.</sup> for nearly thirty years, and during that time acted upon and followed in numerous cases, not only in the High Court, but in this Court, affords a very strong presumption of accuracy, and that nothing but demonstration of its unsoundness, or the authority of a higher Court, ought to hinder us from following it.

We have been furnished with no such authority, and I can perceive no legal principle which it contravenes. The obligation of the purchaser is to indemnify the vendor against the mortgage debt, and the right of the vendor in equity in such a case is the same as that of a surety, namely, to compel the purchaser to pay the mortgage: Story's Equity Jurisprudence, 2nd Eng. ed., p. 327; De-Colyar's Law of Guarantees, p. 276, and cases cited note (a). The mortgagor is not obliged himself in the first instance to pay the debt, nor even to wait until he is sued, but he may at once, as soon as the debt is due, bring an action to compel the purchaser to pay: *Lacey v. Hill*, L. R. 18 Eq. 182; *Wooldridge v. Norris*, L. R. 6 Eq. 410, cited by the Chief Justice in *Mewburn v. Mackelcan*, 19 A. R. at p. 739. He may bring that action for his own relief and protection, or he may do so at the request of the mortgagee. In any case it is the mortgagee who is to receive the money. In such an action the mortgagee would be a proper party, for the purchaser would have a right to have the true amount due on the mortgage ascertained and settled in a manner binding on the mortgagee: see *Lacey v. Hill*, L. R. 10 Eq. 182. If that is the case, what objection can there be to an assignment? If by mutual consent of the mortgagor and mortgagee they may join in one action against the purchaser, why may an assignment not be made, for that is no more than a consent to such an action being brought? The right of action in such a case was always a right in equity and not at law. By the old rules of practice in equity the mortgagor



**Judgment.** was a necessary party because the equity was his. But  
**MACLENNAN,** under the new practice I see no reason why, having assigned  
**J.A.** his right, and thus having given his consent to the enforcement of it, the action should not be maintainable by the mortgagee in his own name.

Suppose after the equity of redemption had been sold, the vendor bought the mortgage debt and had it assigned to him, he would then be entitled to the money, as well as having the right to compel its payment. Would it not be a strange thing if he could not then assign both the debt and the right to recover it to any other person? I think to hold otherwise would be contrary to the whole spirit of the law as it stands at the present day. It would be to say that an equitable right to a sum of money was not assignable, a proposition which could not be maintained for a moment.

In the present case the obligation is an equitable one. I can perceive no sound distinction between that and a similar legal right. Suppose a covenant by A. with B. to pay a sum of money to C., can any reason be suggested why B. should not assign that covenant to C., so as to enable him to recover it in his own name? Before the Act relating to assignments of choses in action no doubt such an action must have been brought in B.'s name. C. could not bring it without B.'s consent, but with consent there could be no objection. And under the changed law, with an assignment of the covenant, C. can, as I think, unquestionably sue and recover in his own name. There can be no sound distinction between the two cases. The matter concerns a debt in both cases. The sole difference is that in the one case it is a legal obligation and in the other an equitable one.

The freedom with which contracts are now held to be assignable is apparent from many cases. In *McPhillips v. London Mutual Fire Ins. Co.*, 23 A. R. 524, this Court held that a fire policy on goods was assignable before loss to a person who had no interest in the goods. And in *Jacoby*

v. *Whitmore*, 49 L. T. N. S. 335, it was held by the Court of Appeal that an agreement between an employer and his servant that the latter should not carry on a similar business at any time thereafter within a certain area was binding on him, notwithstanding that the employer had removed his business to another place or had assigned it to a third person, or had retired from the business without assigning it; and that since the Judicature Act it was enforceable by the assignee in his own name. It was said that the present is a mere obligation of indemnity, a mere personal right. That objection would be very strong, and perhaps unanswerable in the case of an assignment to a stranger; but when it is assigned to the person entitled to the money it merely unites the right of action and the right to the money, and enables that to be done directly which admittedly could be done circuitously. I think it is too plain for argument that the cases such as *Prosser v. Edmonds*, 1 Y. & C. Ex. 481, in which it was held that assignments savouring of maintenance or champerty are void, have no application to the present. Both parties have a substantial interest. The one has a right to receive the debt, and the other a right to be relieved from it. They agree by the assignment that those two undoubted rights shall be united. There is nothing savouring of maintenance or champerty in that. The assignment in such a case operates by way of agreement: *Wright v. Wright*, 1 Ves. Sen. 409, and the agreement is that the debt, which is admittedly due, shall be recovered by him who is entitled to it from him who ought to pay it.

Judgment.  
MACLENNAN,  
J.A.

In Fry on Specific Performance, 3rd ed., at p. 97, the learned author classifies the contracts which are not assignable in equity, none of which classes includes the present case: and see also section 235; *Wilson v. Short*, 6 Hare 366; *Reynell v. Spry*, 1 D. M. & G. 660; *DeHoghton v. Money*, L. R. 2 Ch. 164.

I am therefore of opinion that the assignment in this case is valid, and that the appeal should be dismissed.

Judgment. BURTON, J. A. :—

BURTON,  
J. A.

[The learned Judge stated the facts and continued:]

Here, then, is a deliberate act, the deed settled between the solicitors of the parties, and in the absence of fraud it seems to me beyond question that is binding upon them.

We start, therefore, from this point. Since the period referred to, when lands were disposed of at fictitious prices, as the owners soon discovered when values fell, the mortgagees sought to make good their losses by endeavouring to enforce their claims by resorting to some subsequent assignee of the land who might perchance be solvent, and this was accomplished by their taking a transfer from the mortgagor or some subsequent assignee of the land of the covenant or obligation which he held from his immediate vendee to indemnify him against the mortgage.

This has become so common that it was assumed on the original argument that such an obligation was assignable and vested in the mortgagee a right to sue the assignee for the mortgage debt, and in consequence of the difference of opinion existing among the Judges and at the bar, we desired the question to be argued, and it was accordingly argued during the recent sitting.

As between the immediate parties the doctrine of the Court is clear and is nowhere, that I am aware of, more tersely and clearly expressed than by Lord St. Léonards, who uses this language (*Jones v. Kearney*, 1 Dr. & War. 134, at p. 155: "Now, what was the situation in which the defendant stood. He became the assignee of the premises. He was in the ordinary position of a purchaser buying an estate *cum onere*. The premises were subject to a burden: the purchaser did not enter into any particular obligation to discharge that burden, or to indemnify the seller; it was not necessary that he should do so. This Court fastens on every such purchaser a liability to indemnify the seller against the encumbrances affecting the property sold. If I create an encumbrance on my estate, and sell, and no engagement be entered into with respect to that encum-

brance, but I convey the estate subject to it, the purchaser is bound in equity to indemnify me against such encumbrance."

Judgment.

BURTON,  
J.A.

But whether such equitable obligation is assignable, and the effect of such an assignment, has led to a great divergence of judicial opinion. One of the earliest cases in our own Court—*Re Cozier, Parker v. Glover*, 24 Gr. 537—went a long way, and the element of a transfer of the obligation, as in the present case, was wanting. The learned Judge there held that although the acceptance of a deed subject to a mortgage implies an agreement to indemnify the grantor it did not enure as an undertaking to pay the debt unless the amount is included in the consideration and retained by the vendee as so much money belonging to the encumbrancer.

The case was peculiar. The vendor there swore: "I sold the land to Cozier on condition that he would pay the mortgage to McFarland, and the only sum ever paid by Cozier was paid to McFarland," and the learned Judge held that such payment on account of the mortgage was such an act on the purchaser's part as to imply an agreement to hold the money for the use of the mortgagee.

The decision in *Re Cozier* has not met with universal approval, but it proceeded upon the distinct ground that all parties had consented to the money being treated as money belonging to the mortgagee.

Another case of *Campbell v. Robinson*, 27 Gr. 634, has been much criticised, and seems to have proceeded on the ground that the order was there made for the benefit of the mortgagor, who had become a mere surety for the purchasers of the equity of redemption.

There was no privity between the mortgagee and the defendants, who were purchasers of the equity of redemption, and no personal order could have been granted to the plaintiff against them; but the mortgagor being a defendant asked for that relief against them, and, being considered to be entitled to be indemnified, the decree rightly or wrongly was allowed to go for their benefit.

Judgment.

BURTON,  
J.A.

In *Cumberland v. Codrington*, 3 Johns. Ch. 229, at p. 261, Chancellor Kent said that agreeably to the English authorities a purchaser of an equity of redemption who covenants to indemnify the vendor against the mortgage debt does not thereby make the debt his own, so as to render his personal assets the primary fund to pay the mortgage. "The cases all agree that no covenant with the mortgagor is sufficient for that purpose. There must be a direct communication and contract with the mortgagee; and even that is not enough, unless the dealing with the mortgagee be of such a nature as to afford decided evidence of an intention to shift the primary obligation."

That case agrees with *Re Cozier*, *Parker v. Glover*, 24 Gr. 537, but shews that the evidence must go the full length of shewing an agreement between the mortgagee and the owner of the equity of redemption.

It does not appear to me to be very material whether there is an express covenant to pay the mortgage and indemnify the vendor, or the obligation is to be gathered from the form of the conveyance, the land being transferred or granted subject to the mortgage; in either case the obligation is to be considered simply as an indemnity to the vendor: *Barham v. Earl of Thunet*, 3 My. & K. at p. 624.

In neither case was the provision made for the benefit of the mortgagee, but was for the mere indemnity of the vendor.

It was perfectly immaterial to the vendor how he was protected so long as he was protected, and a payment to him of a sum equivalent to the mortgage money would satisfy the obligation, but it would not follow, as it seems to me, that the vendor would be justified as of right in handing that money over to the mortgagee.

The effect of such a covenant is well described in the *American Notes to White & Tudor's Leading Cases*, 4th ed., vol. 2, p. 342: "Whether the covenant can be enforced, and for how much, depends first on the account between the mortgagor and mortgagee, and next on the election of the

mortgagee to proceed against the mortgagor personally, instead of having recourse to the lands."

Judgment.  
BURTON,  
J.A.

It was said that in the present case, where the vendor is the original mortgagee, it is sufficient to shew that the mortgage is overdue and that it differs in that respect from a similar action against a person who is one of several intermediate assignees, inasmuch as such person may never be called upon by his vendor, but the cases appear to me to be the same in principle. The mortgagee may for reasons of his own prefer to foreclose, in which case no liability might ever arise.

It is very different from an action on a bond taken by the mortgagee from a surety as collateral security for the payment of the mortgage money; the moment any portion of the mortgage money becomes due the mortgagee's cause of action is complete.

This is not a question upon which we can derive much assistance from American decisions, some of which depend upon what is called the equity of a statute passed in some of the States for the foreclosure of mortgages. I have read that statute carefully, and think it very clearly defines the cases which the framer had in view, and should be induced to regard those decisions as a disregard of the plain words used in the enactment in the endeavour to do justice (quoting the language of Bramwell, L. J.) more or less fanciful in the particular case.

It is contended that whatever rights or equities the mortgagor had against the defendant were assignable, and, having been assigned, it gives a direct right of suit and creates the privity which alone was wanting to make such a suit sustainable, and a dictum of the late Chancellor Spragge is relied upon for that position.

The case referred to is *Irving v. Boyd*, 15 Gr. 157. The only point really decided in that case was that such a right as the present was not the subject of a sequestration, and it is a mistake to say, as was said in *British Canadian Loan Co. v. Tear*, 23 O. R. 664, that Mowat, V.-C., approved of that dictum. The Vice-Chancellor agreed that such a right

**Judgment.** could not be reached by a sequestration, and nothing more.

**BURTON,  
J.A.**

Nor do I agree that the dictum of Vice-Chancellor Spragge has been adopted in numerous decisions since. I join my brother Maclellan in the view that a dictum of that learned Judge upon a point of this kind is entitled to great weight, but after all it is but a dictum, however emphatically expressed, and is not, however antiquated, entitled to be regarded as binding as a judgment upon the point.

I incline myself to the view that the validity of the assignment of such obligations has been rather "law taken for granted," and I must confess that when I expressed myself as I did in *Ball v. Tennant*, 21 A. R. 602, I was labouring under that impression, and had made no special examination for myself.

I quite admit the general rule that the benefit of almost all contracts is assignable in equity, but there are exceptions, among them these: (1) Where the contract is personal; (2) Where the contract itself contains a provision that it shall not be assignable; and (3) Where the contract is illegal or contrary to public policy.

This case, as it appears to me, falls within the first of these exceptions.

The right or equity, or whatever it may be called, in the present case was a mere personal right on the part of the mortgagor to be indemnified. He and his estate are entitled to the benefit of that obligation. If that right had been assigned to any stranger other than the plaintiff, is it not clear that it would be valueless in his hands? Can it make any difference that it has been assigned to the plaintiff and does it become in her hands a contract of a different nature than it was in the hands of the mortgagor—a direct contract to pay the money to the holder of the assignment?

In some of the American cases it is said that the mortgagor having become as between himself and the defendant a surety merely, the principal creditor is entitled to the full benefit of that security. Without pausing to enquire into the applicability of that doctrine to the case in

review, what is it that under it the plaintiff would be entitled to?—the obligation of the defendant to indemnify the mortgagor.

In one of the cases to which I have referred, the Chancellor distinctly repudiates the idea of any right being acquired by the mortgagee on the ground that the contract was made for his benefit, so that in that view, if there had been an express contract by the defendant with the mortgagor to pay this mortgage, that would manifestly give no right of action to the mortgagee, the contract not being made for his benefit, and such a covenant being in law a mere contract of indemnity the transfer of it would pass no greater or different right than the assignor himself possessed.

But there is another ground which, in my opinion, is fatal to the plaintiff's recovery ; up to the time of the assignment the plaintiff had not elected to pursue her personal remedy against the Morrisons ; she might never have elected to do so, and before any breach therefore of the defendant's obligation the Morrisons assigned it to the plaintiff. It may be that they could have sued the defendant before the recovery of judgment against them ; but I incline to think they could not have sued until threatened with a suit.

It was not until after this transfer that the plaintiff sued the Morrisons, and she then joined them and Maloney in the same action, but there is no privity between her and Maloney ; and there had been no breach of Maloney's obligation to the Morrisons entitling them to sue. If at the time of the assignment the Morrisons could not sue, neither can the plaintiff who stands in no higher position.

I do not at all dispute that this is a purely equitable obligation, nor the freedom in equity to assign most contracts, but what I do not understand is that the nature of an obligation can be changed any more in equity than in law ; that obligation remains the same in whose hands

Judgment.

BURTON,  
J.A.



Judgment.

BURTON,  
J.A.

soever it may be ; it is an obligation to protect the vendor and his estate from loss.

A recent case in this Court has been referred to in which I concurred, and which is, I think, good law—*McPhillips v. London Mutual Fire Ins. Co.*, 23 A. R. 524.

That case is very different from the present, and was not a mere indemnity. It was a fire policy on goods, which might result in a claim ; that contingent claim was assigned as security for a debt, and we thought it was clearly assignable.

I think the case of *Jacoby v. Whitmore*, 49 L. T. N. S. 355, is also very distinguishable. What was held to be assignable there was something which was part of the good will of the business, and so would pass to the purchaser.

As I stand alone, I may well feel distrustful of my own judgment, but the reasoning of my learned brothers has not removed my doubts, and I feel constrained, therefore, to deliver this dissenting judgment, explaining my reasons for differing from them.

I may venture before closing to point out an error into which I think my brother Robertson has fallen when he speaks of both assignor and assignee seeking to enforce the obligation in the same way, which might bring the case within the decision in *Campbell v. Robinson*, 27 Gr. 634, where the mortgagor being sued asked for a remedy over, but that is not this case where the plaintiff, being the assignee of such an equitable right, seeks to recover on it as if it were an absolute and unconditional promise to pay the mortgage debt.

It does not strike me that such cases as *Leith v. Freeland*, 24 U. C. R. 132, have any bearing on the question we are considering. That was the case of a bond given directly to the plaintiff conditioned for the payment by one Brown at maturity of a mortgage given by the plaintiff to Small, which Brown had agreed to assume. If Brown had given such a bond it would be quite clear that upon the mortgage falling due the plaintiff could recover the full

amount, and Freeland assumed precisely the same liability. Numerous cases to the same effect are to be found in the books, mostly depending on the construction of a bond given to the party suing where the contingency provided against had actually happened, but they do not at all assist us in deciding on the effect of the transfer of such an obligation as we have here.

Judgment.  
BURTON,  
J.A.

The learned Judge seems to have based his judgment on two grounds; first, he thought *Boyd v. Johnston*, 19 O. R. 598, decisive of the case, and secondly, he seems to have been under the impression that if Sarah Morrison paid the mortgage she would have nothing to represent the payment.

Upon the first point I quite agree with *Boyd v. Johnston*, 19 O. R. 598. It states the law as I have stated it in the extract from Lord St. Leonards' judgment, and as it was stated by Chancellor Blake in *Thompson v. Wilkes*, 5 Gr. 594, but nothing more. It certainly does not decide that the assignment of such an equitable obligation as the present, before the holder of it has been damnified, gives to the transferee a right to sue the owner of the equity of redemption, who, as between himself and the mortgagor, has become the party to pay off the mortgage.

Upon the other point the learned Judge seems to have overlooked the fact that Sarah Morrison upon payment of the debt would have been entitled to a conveyance of the legal estate, to stand in fact in the shoes of the mortgagee, and to an indemnity from the defendant Maloney: see *Kinnaird v. Trollope*, 39 Ch. D. 636.

Beyond the dictum in *Irving v. Boyd*, 15 Gr. 157, I have been unable to find any case in England, and, until the recent decisions here, any case in our own Courts, to countenance the view that an obligation to indemnify a particular person is the subject of an assignment so as to vest in the assignee, whether a mortgagee or a stranger, a right to sue as if the contract had been made with himself to pay the mortgage. I think that it remains, in whosoever's hands it may be, a mere personal covenant or obligation to indemnify the person

**Judgment.** to whom it was given, and until damnified that person has  
**BURTON,** nothing to transfer.  
**J.A.**

For these reasons, I think we should allow the appeal and dismiss the action against Maloney.

*Appeal dismissed, BURTON, J. A., dissenting.*

R. S. C.

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ROSE V. MCLEAN PUBLISHING COMPANY.

*Trade Name—Geographical Designation—“The Canadian Bookseller and Library Journal”—“The Canada Bookseller and Stationer.”*

The use of a geographical name in a secondary sense as part of the title identifying a mercantile journal and not as merely descriptive of the place where the journal is published will be protected.

The use of the name “The Canada Bookseller and Stationer” was restrained as conflicting with the name “The Canadian Bookseller and Library Journal.”

Judgment of a Divisional Court, 27 O. R. 325, reversed, MACLENNAN, J.A., dissenting.

**Statement.** THIS was an appeal by the plaintiff from the judgment of a Divisional Court, reported 27 O. R. 325.

The plaintiff was the publisher of a journal called “The Canadian Bookseller and Library Journal,” and brought the action, under the circumstances stated in the report below and in the judgments in this Court, to restrain the defendants from publishing a journal of a similar kind, under the name of “The Canada Bookseller and Stationer.”

The action was tried at Toronto, on the 28th of October, 1895, before MACMAHON, J., who gave judgment in the plaintiff's favour, but his judgment was reversed by a Divisional Court.

The plaintiff appealed, and the appeal was argued before BURTON, and MACLENNAN, JJ.A., and FERGUSON, and ROSE, JJ., on the 28th of September, 1896.

*George Kappeler*, and *J. Bicknell*, for the appellant.

Argument.

*Robinson*, Q. C., and *R. C. Levesconte*, for the respondents.

The line of argument is stated in the report below. The following authorities, in addition to those there mentioned, were referred to: *Sebastian*, 3rd ed., pp. 320, 322; *Reddaway v. Banham*, [1896] A. C. 199; *Carey v. Goss*, 11 O. R. 619; *Canada Publishing Co. v. Gage*, 11 S. C. R. 306; *Lee v. Haley*, L. R. 5 Ch. 155; *Tussaud v. Tussaud*, 44 Ch. D. 678; *Turton v. Turton*, 42 Ch. D. 128; Article, 10 Cent. L. J., [1880] pp. 82, 104, 123.

March 2nd, 1897. BURTON, J. A. :—

I agree entirely with my brother Ferguson's judgment upon the facts of this case.

The plaintiff had for some six or seven years published a journal devoted to the interests of the booksellers in Canada called "The Canadian Bookseller and Library Journal." The defendants had up to the month of March, 1895, published a journal called "Books and Notions," and that publication had been in existence about eleven years.

The defendants then made a change in the title of their journal, calling it "The Canada Bookseller and Stationer," and one cannot be surprised that the learned Judge who tried this case drew the inference that the title was so changed to deceive the public into the belief that their journal was published by the plaintiff, or that there was a proprietary connection between the new journal and the old journal. How can it be said that that was a wrong inference? The only other thing necessary to be established, leaving out of view for the moment the right of a person to the use of a common geographical name, is that there is damage to the plaintiff—probable damage, not necessarily damage already suffered as the result of the defendants' conduct.

The learned Judge has also found this issue in the plaintiff's favour, and I think that finding ought to be sustained.

**Judgment.**

**BURTON,  
J.A.**

It was urged that the addition of the other words adopted by the defendants in the title of their new journal was sufficient warning to the public that they were not publishing the plaintiff's paper. I agree with the learned Judge below that the attention of the public would not be attracted to anything beyond the two principal words in the title "Canadian Bookseller," and "Canada Bookseller."

It is not material in this case that the books differ in appearance; many persons using the publication for advertising or other purposes never see the publication itself, but may be led by the similarity in name to send their communications to one when intending to send them to the other.

The learned Judge has been overruled, and his judgment reversed on the ground that there can be no monopoly or property in a geographical name.

The Divisional Court agree that there has been a long enough user to give the plaintiff a *locus standi* in Court, but they hold that in the case of a geographical name there must be in addition some secondary meaning attributable to the epithet which is sought to be appropriated—some secondary meaning connoting the character or quality of the product.

The dicta to be found in the books upon this subject are not very satisfactory, and some of them perhaps not altogether consistent, but the cases in which the question has generally arisen have related to the products or manufactured articles of a particular country or district, and, speaking generally, a geographical description as applied to an article so made or sold, which may be applied truthfully by other makers or dealers, cannot usually be regarded as entitled to protection as a trade mark.

The reason of the rule is this, that a generic name is not to be used in reference to such an article, where every person residing within the particular place or district is equally entitled to its use, the design of the law being not to foster monopolies.

In such cases, therefore, it would be necessary, as in

the *Glenfield Starch* case (*Wotherspoon v. Currie*, L. R. 5 H. L. 508), to shew that it had acquired a secondary meaning; that in connection with the particular manufacture, in other words, it had become the trade denomination of the article made; but where a name, though generic and geographical, does not indicate the composition or quality of the specific article to which it is applied, or the particular country or district where produced or manufactured, the rule does not apply.

There is a difference between the rules in England and America upon the subject even as regards goods; in England, if the Court finds from the evidence that the geographical name used as a trade mark has by long and extensive use acquired a secondary meaning that use will be protected.

Thus in *Lee v. Haley*, L. R. 5 Ch., at p. 161, Giffard, L. J., said: "I quite agree that they have no property in the name (Guinea Coal Company), but the principle upon which the cases on this subject proceed is, not that there is property in the word, but that it is a fraud on a person who has established a trade and carries it on under a given name, that some other person should assume the same name, or the same name with a slight alteration, in such a way as to induce persons to deal with him in the belief that they are dealing with the person who has given a reputation to the name."

That the name or title of a work may be considered as a kind of trade mark which no person other than the proprietor of the work can use so as to damage him in respect of his property in it, seems to be established by *Seeley v. Fisher*, 11 Sim. 581; *Spottiswoode v. Clarke*, 2 Ph. 154; *Mack v. Petter*, L. R. 14 Eq. 431.

In *Whitfield v. Loveless*, 64 Off. Gaz. 442, the defendant selected the name of "Columbia Hotel" for the name of the hotel run by him in Chicago. The name had, prior to that time, been used by the complainant to designate his hotel.

It was there contended that the name "Columbia" was

Judgment.

BURTON,  
J.A.

Judgment.  
BURTON,  
J.A.

a geographical name, and not subject to exclusive appropriation by any person, but the Court held that the person selecting the word "Columbia," selected it as a mere fanciful name; that no monopoly was thereby created, and protected him in the use of it on the further broad legal ground—which applies here—that that which is prior in time is first in right.

That was the argument used in a case decided in 1864, in the Court of Chancery in England: *McAndrew v. Bassett*, 10 Jur. N. S. 550. There the plaintiffs, who were manufacturers of liquorice, having made a new description of goods from a mixture of juice obtained from Anatolia, stamped upon the manufactured article the word "Anatolia," and sold it to the public, and this was immediately afterwards imitated by the defendants, who probably were not aware that it was the mark of the plaintiffs; and the Lord Chancellor, in alluding to this, uses this language: "But if a man finds an article sent to him from the market bearing a stamp, and he intentionally appropriates that stamp and thenceforth uses it for the purpose of designating his own article, laying aside the mark that he had previously used, and appropriating that which he ought to have inferred was the property of another, he must take the consequences." And dealing with the question of the word being a geographical designation of a whole country, he adds: "That is nothing in the world more than a repetition of the fallacy which I have frequently had occasion to expose. Property in the word for all purposes cannot exist; but property in the word as applied by way of stamp upon a stick of liquorice does exist the moment the liquorice goes into the market so stamped and obtains acceptance and reputation in the market."

All these points, as applied to a trade journal, in place of sticks of liquorice, are undoubtedly found in this case.

In the *Vienna Bread case*, (*Fleischmann v. Schuckmann*, 62 How. Pr. 92) the Court said: "The plaintiff was the

first to use it here to distinguish a manufacture of bread. As a mark for bread it is purely arbitrary, and is in no manner descriptive, either of the ingredients or quality of the article. \* \* By the use of the word 'Vienna' in that connection, no deception is practised, because the place of its manufacture is given."

Judgment.

BURTON,  
J.A.

The case of *Canal Co. v. Clark*, 13 Wall. 311, though not binding as an authority upon us, falls within the line of cases to which I have referred, where other parties were equally entitled to describe their coal in a particular way,

In reference to it, Mr. Browne in his work says (2nd ed. p. 201): "The word 'Lackawanna' was not devised by the complainants. They found it a settled and known appellative of the district in which their coal deposits and those of others were situated. The defendant invaded no right in employing the name, for he made no false representation. All the coal taken from that region is known in trade, and rated in public statistics, as 'Lackawanna coal.'"

It is by no means universally true that a person cannot appropriate the name of a geographical district as a trade name: see *Newman v. Alvord*, 51 N. Y. 189; 10 Am. R. 588; *Congress and Empire Spring Co. v. High Rock Congress Spring Co.*, 45 N. Y. 291; and several other cases referred to in Mr. Browne's work on Trade Marks.

In the present case, as it seems to me, in the selection of the word "Canadian," the plaintiff chose merely a fanciful name. It is true the selection was so made in consequence of the journal being gotten up in the interest and for the information of the trade in Canada, but it indicates no product, no locality for the production of a specific article, no manufacture of any particular country. It is not necessary, therefore, as in some of the cases to which I have referred, to seek a secondary meaning; as a mark for this journal it was purely arbitrary, and is in no manner descriptive of any article of manufacture.

In *Newman v. Alvord*, 51 N. Y. 189; 10 Am. R. 588,



**Judgment.** this language is used, which I think very applicable to this case: "It is sometimes said, in the cases to which our attention has been called, that the claimant of a trade mark must have the exclusive right to it. This form of expression, I apprehend, is not strictly accurate. The right must be exclusive as against the defendant. It is generally sufficient, in such cases, if the plaintiff has the right and the defendant has not the right to use it. The principle upon which the relief is granted is that the defendant shall not be permitted, by the adoption of a trade mark which is untrue and deceptive, to sell his own goods as the goods of the plaintiff, thus injuring the plaintiff and defrauding the public." Or, applying the language to the present case, the defendants shall not be allowed to assume a name for their journal which is practically the same as the plaintiff's, and thereby probably obtain advertisements which were intended for his.

**BURTON,  
J.A.**

The decision, if upheld, will be very far reaching. I fail to see at present why the proprietors of "The Canada Law Journal," "The Albany Law Journal," and scores of other papers are not fairly entitled to protection in the titles they have assumed. In the present case the title the plaintiff had so long used was known to the whole trade, and the defendants by their own shewing deliberately adopted it (for there is no substantial difference between "Canada" and "Canadian"), and the fact of its adoption by the defendants in preference to the title which they had previously used is itself pregnant with proof that they regarded it as of value.

I think that the evidence would have warranted an injunction against the use of the word "Bookseller" alone: see *Reed v. O'Meara*, [1888] 21 L. R. Ir. 216; *American Grocer Publishing Association v. Grocer Publishing Co.*, 25 Hun (N. Y.) 398.

For these reasons I think with great submission that the appeal should be allowed, and the original judgment restored.

FERGUSON, J.:—

Judgment.

FERGUSON, J.

Although the evidence is (considering the nature of the case), very long, the material facts giving rise to the action lie, as it appears to me, in a comparatively small compass.

The plaintiff was publishing a journal devoted to the interests of the booksellers in Canada, which had its commencement about seven years before this action, and was and is called "The Canadian Bookseller and Library Journal." In saying that the journal was devoted to the interests of the booksellers in Canada, I do not desire to be understood as meaning that it performed no function or had no influence outside of Canada, but, whether this is so or not, I do not consider material here.

Up to about the month of March, 1895, the defendants were publishing a journal called "Books and Notions," which had been about eleven years in existence, and some time prior to that period (March, 1895), they desired to change the name of their journal. After some consultation—as the evidence shews—with business friends as to what would be an appropriate name, the defendants concluded to change, and did change, the name of their paper or journal, adopting the name "The Canada Bookseller and Stationer." The plaintiff had after the words "The Canadian Bookseller," and apparently as part of the name of his journal, the words "and Library Journal." Yet stress was not laid upon this by counsel; and I do not perceive it to be of much materiality, and immediately upon the first number of the defendants' journal appearing with the newly adopted name, they were notified that the plaintiff objected to the use of the name as being an infringement of or encroachment upon his rights in respect of the journal he had as aforesaid been publishing under the name "The Canadian Bookseller," yet the defendants went on publishing their journal under the new name.

This state of things has given rise to the litigation. What the plaintiff asks is, an injunction, damages and costs.

The law bearing generally upon subjects of this charac-

Judgment. ter has been frequently stated, so frequently that, in some instances, learned Judges in the English Courts have assumed that it would not longer be a matter of contention.

For the purposes of the present case, I think it may be stated thus: To entitle the plaintiff to the interposition of the Court the name of his journal must be used in such a manner as to be calculated to deceive or mislead the public or the trade in which the journal circulates, or is intended to circulate, and to induce them to suppose that the journal published by the defendant is the same as that which was previously being published by the plaintiff, and thus to injure the patronage and circulation thereof; cases of actual fraud may stand on a different footing.

The absence of proof of a fraudulent intention is no defence in cases of this kind if there is such an imitation as to be calculated to deceive: see Sebastian, 3rd ed., p. 322, and cases and authorities there referred to.

It seems that the right of a plaintiff in an action of this character is a right in the nature of a trade mark, and, it follows, as I think, that the law respecting trade marks largely applies: see the language of James, L. J., in *Levy v. Walker*, 10 Ch. D., at pp. 447, 448.

I am of the opinion that one who peruses the whole of the evidence in the present case is obliged to come to the conclusion that the use of the name adopted and used by the defendants, as the defendants have used it, was calculated to mislead and deceive persons intending to purchase, employ, or otherwise deal in regard to the plaintiff's journal, to such an extent that they would probably in many instances adopt the defendants' journal instead.

There is some evidence going to shew that a person in the trade, or an intelligent person whose attention had been called to the subject, would not, or probably would not, be so misled or deceived; but such is not the real question, which is as to the effect of the use of the name used, and as used by the defendants, in respect to the ordi-

nary person not forewarned on the subject, and whether in the trade or not, for the plaintiff, if entitled at all to the exclusive use of the name he has adopted and employed as the name of his journal, is so entitled to it in respect to the whole community; and besides, there is evidence going to shew that persons in the trade, and even skilled in the trade, were liable to be confused and misled in the way that I have referred to.

I think that a fair conclusion upon the evidence is that, if it be assumed that the plaintiff had the exclusive right to the use of the name of his journal, the conduct of the defendants in the use of the name they adopted for their journal was calculated to injure the patronage of the plaintiff's journal, and would most probably do so. I may here say that the leading or most prominent words in the name adopted by the defendants seem to me little more or less than an echo of the words used by the plaintiff in the name of his journal. So far, if it were to be assumed in the plaintiff's favour as above, he would seem to be entitled to succeed.

The question, however, most discussed at the Bar, was as to the title of the plaintiff to this exclusive right. The leading word in the name is a geographical name, "Canadian." It was contended that this word had not acquired any secondary meaning by its being used as it had been used by the plaintiff, but simply meant that the plaintiff's business was carried on in Canada, was intended for the trade in Canada, etc., and that beyond this it had not acquired any meaning of which the plaintiff could avail himself as designating his journal after the manner in which goods would be designated and known by a trade mark.

There is high authority for saying that where the name of a place precedes the name of an article sold, it *prima facie* means that this is the place of production or manufacture, but that it may also be descriptive of the article: see the remarks of Lord Herschell in *Reddaway v. Banham*, [1896] A. C., at p. 212.

Judgment. Respecting the use of geographical names as trade marks, **FERGUSON, J.** etc., I was much impressed with what I considered very incisive language and reasoning of the learned Judge who delivered the judgment of the Supreme Court of the United States in the case *Canal Co. v. Clark*, 13 Wall. 311. At p. 324, the Court said: "And it is obvious that the same reasons which forbid the exclusive appropriation of generic names or of those merely descriptive of the article manufactured and which can be employed with truth by other manufacturers, apply with equal force to the appropriation of geographical names, designating districts of country. Their nature is such that they cannot point to the origin (personal origin) or ownership of the articles of trade to which they may be applied. They point only to the place of production, not to the producer, and could they be appropriated exclusively, the appropriation would result in mischievous monopolies."

That decision, however, had regard to natural productions of the district of country whose name had been adopted, and the right to the exclusive use of it sought to be established. The present case has regard not to any natural production, but to a publication, the fruit of industry in the country whose name has been adopted. The illustrations given in the same judgment, though applying to that case, could have no real application to the present case. The Court there referring to the case *Brooklyn White Lead Co. v. Masury*, 25 Barb. 416, said that it was a case of fraud, and that with absence of fraud each party would have an equal right to the use of the name "Brooklyn."

There have, however, been a very large number of decisions in which plaintiffs have been protected in the exclusive use of geographical names as trade marks, etc. Many of these are referred to in the judgment of Mr. Justice Burton, which I have had an opportunity of perusing. The decisions in those cases are not all placed on the same legal footing, and there is difficulty in extracting from them any rule that would be a safe and certain guide. The fact

remains that the decisions exist, and many of them are binding, and must be considered good law. Judgment.

FERGUSON, J.

After much consideration I have arrived at the opinion that the plaintiff must have adopted and used the name "The Canadian Bookseller" as a sort of fanciful name rather than for the purpose of describing his business as a business of bookselling belonging or appertaining to Canada, and I think it not unfair on the evidence to say that during the seven years of user of the name the publication or book came to be known by the name, and that the name had in this way acquired the secondary meaning or signification about which so much was said on the argument of the case.

I have already said that the use of the name adopted and used by the defendants, as the defendants did use it, was calculated to mislead and deceive persons intending to deal, etc., in regard to the plaintiff's journal to such an extent that they would probably adopt the defendants' book instead. I think I am justified in adding that it is difficult not to think that this was at least one of the things intended by the defendants when they changed the name of their publication or journal. I do not think the consultations on the subject of this change shewn by the evidence are at all convincing to the contrary, and taking into consideration the manner in which the business with journals of the kind of these is done, I do not think the fact of the defendants not adopting the form and appearance of the plaintiff's book is convincing that such intention did not exist.

On the whole case I agree in the conclusion arrived at by Mr. Justice Burton, that the appeal should be allowed, and the original judgment restored.

ROSE, J. :—

I agree to the conclusion stated by my learned brother Burton and the reasons supporting it.

Any other conclusion would seem to me to be contrary

Judgment.

Rose, J.

to natural justice. My learned brother MacMahon, the Judge of first instance, was of the opinion that whatever might have been the intention of the defendant company, the result of its action was such that there was "every probability of the plaintiff being injured by the public being deceived," and the Divisional Court, while reversing that judgment, took such an adverse view of the defendants' conduct as to refuse costs.

I am glad to find what I believe to be solid ground upon which to rest to prevent a manifest fraud, whether it be called legal or moral fraud.

I am of the opinion that the appeal should be allowed with costs, and the judgment of my brother MacMahon should be restored.

MACLENNAN, J. A. :—

After the best consideration which I have been able to give to this case, and to the numerous authorities which have been cited, I am of opinion that the judgment of the Divisional Court is right, and that the plaintiff's case fails.

The defendants' publication is as different in form and appearance from that of the plaintiff as it could well be; and the title which the defendants have adopted is also very different. The plaintiff's title is "The Canadian Bookseller and Library Journal," and that of the defendants is "The Canada Bookseller and Stationer." The only common element is the word "Bookseller." The others are all different. The words "Canada" and "Canadian," are geographical, as mentioned by the learned Chancellor, and the word "Bookseller" is descriptive of the subject and matter of both publications. The geographical terms serve to distinguish both publications from similar publications in England and the United States, and I am unable to say that that part of the plaintiff's title had become so much of the essence of it as to be its distinguishing characteristic, and, therefore, in point of law to deprive the defendants of the right to use it in a varied form. Then as to the

word "Bookseller":—it must always be allowable to a person engaged in business or manufacture to use with reasonable freedom words descriptive of his business or product, so long as he is careful to distinguish it from the business or product of other persons.

Judgment.  
MACLENNAN,  
J.A.

The English language is the common property of all persons for the purpose of describing their business or the products of their industry, and those who are engaged in similar business must necessarily use descriptive language more or less similar. What is forbidden is so to use language, whether intentionally or not, as to represent one's business or products as the business or products of another person.

I do not think the defendants can properly be said to have done that, or that they have adopted a name and title for their publication of which the plaintiff has any right to complain.

I therefore think that the appeal should be dismissed.

*Appeal allowed, MACLENNAN, J. A., dissenting.*  
R. S. C.



## BOWIE V. GILMOUR.

*Intoxicating Liquors—Action for Price of Goods Sold—Illegal Object of Sale—Sale of Liquor to Unlicensed Dealer—Pleading Illegality.*

In an action to recover the price of ale sold to the defendant by the plaintiffs, duly licensed brewers, it appeared that immediately after the order was booked, the plaintiffs were informed by her purchasing agent that the defendant had no license to sell, and it was then arranged that she should have the benefit of the plaintiffs' wholesale license and sell as their agent. The defendant pleaded that the ale was supplied to her for the purpose of its being sold by her in contravention of the Ontario Liquor License Act :—

*Held*, that the delivery of the ale having taken place with the knowledge of the purpose of the defendant, which was illegal, and having been made for the purpose of enabling her to carry that out, the plaintiffs could not recover.

Decision of ARMOUR, C.J., at the trial reversed.

**Statement.** THE plaintiffs, Bowie & Company, brought this action against Ada Laura Gilmour, claiming \$1,218.17, as the price of certain liquor sold to her by them on August 8th, 1895.

The defendant pleaded, amongst other things, that the plaintiffs who were brewers, had no proper license to sell the liquor for consumption in the Province, and that she herself was carrying on the business of selling ale, beer, and other intoxicating liquors at Ottawa, without any proper license so to do under the Ontario Liquor License Act, R. S. O. ch. 194, and 55 Vict. ch. 51 (O.), amending the same, and that the plaintiffs well knew this, and therefore were not entitled to recover therefor.

The action was tried before ARMOUR, C. J., at Brockville, on October 25th, 1895, who gave judgment for the plaintiffs as follows :—

ARMOUR, C. J. :—

I find that the amount to which the plaintiffs are entitled, if entitled at all, is the sum of \$1,218.17, less the amount of \$64.15, as set forth in the defendant's statement of defence, or the sum of \$1,154.02 in all. I find that at the time of the sale of the goods for which this action was

brought, the plaintiffs carried on the business of brewers at the town of Brockville, and were the holders of a brewer's license from the Dominion of Canada. I find also that at the time of the sale of the said goods, the plaintiffs were the holders of a wholesale license under the liquor license laws as brewers and distillers, from the Province of Ontario; that such license had been duly issued to the plaintiffs on the first day of May, next preceding the sale of the goods, but had not been actually sent to the plaintiffs until after the sale of the goods.

Judgment.  
ARMOUR, C.J.

I find that it was not until after the plaintiffs had made the sale of the goods to the defendant, that the plaintiffs were made aware that the defendant had no license, and intended to sell the said goods without a license. The plaintiff, Robert Bowie swore that it was after selling the goods to the defendant, that the conversation arose as to the position of the defendant as to a license, and I credit this statement of the plaintiff Robert Bowie, and discredit any statement to the contrary; and I find that the goods were not furnished to the defendant by the plaintiffs in contravention of the Liquor License Act.

It cannot be said in my opinion that the plaintiffs were not licensed to sell by wholesale, although they had complied with the Liquor License Act, and the license had been issued to them, merely because it had not been sent to them, and was not actually in their possession at the time of the sale.

The sale having taken place, as I find it did, at the town of Brockville, the plaintiffs were within their rights in selling, whether to licensees, or others at that place, it being within the district for which they had obtained a wholesale license; and the sale having been made, as I find it was, before the conversation arose as to the position of the defendant, with regard to a license, was a perfectly legal sale, and the plaintiffs could not be said to have made it for the purpose of the goods sold being sold by the buyer without a license, and the sale was not, therefore, a contravention of the Liquor License Act.

Judgment. Judgment will, therefore, be for the plaintiffs for \$1,154.02  
ARMOUR, C.J. with full costs of suit.

The defendant appealed from the above judgment, and the appeal was argued on October 4th and 5th, 1896, before the second division of the Court of Appeal, composed of MEREDITH, C. J., and ROSE, and MACMAHON, JJ.

*Moss*, Q. C., and *McTavish*, Q. C., for the defendant, cited R. S. O. ch. 194, secs. 49, 51, 126; 55 Vict. ch. 51, sec. 5; *Smith v. Mauchood*, 14 M. & W., at p. 464; *Melliss v. The Shirley and Freemantle Local Board of Health*, 16 Q. B. D. 446; *Langton v. Hughes*, 1 M. & S. 593; *Hagar v. O'Neil*, 20 A. R. 198; *Smith v. Benton*, 20 O. R. 344; *Pearce v. Brooks*, L. R. 1 Ex. 217; *Taylor v. Chester*, L. R. 4 Q. B. 309.

*W. S. Buell*, for the plaintiffs, cited *Day v. Day*, 17 A. R. 157; *Simpson v. Bloss*, 7 Taunt. 246; *Scott v. Duff*, 14 Pa. 18; *Waugh v. Morris*, L. R. 8 Q. B. 202; *Taylor v. Bowers*, 1 Q. B. D. 291; Chitty on Contracts, 12th ed., p. 673; *Brooker v. Wood*, 5 B. & Ad. 1052.

March 1st, 1897. MEREDITH, C. J.:—

This is an appeal by the defendant from the judgment of the Chief Justice of the Queen's Bench, in favour of the plaintiffs after the trial had before him without a jury at Brockville, on October 25th, 1895.

The action is brought by the plaintiffs who are licensed brewers carrying on business at Brockville, to recover the price of a quantity of ale sold and delivered by them to the defendant.

The sale took place at the plaintiffs' brewery, and the defendant, who resided at the city of Ottawa, and carried on business there, was not a person having a license to sell liquor under the Ontario Liquor License Act.

The order for the ale was given verbally by the agent of the defendant at the plaintiffs' brewery, and after it was

booked, and at the same interview at which the order was given, the plaintiffs were informed by the agent that the defendant had no license to sell liquor, and an arrangement was then made that the defendant should have the benefit of the plaintiff's wholesale license to enable her to sell the ale, as she to the knowledge of the plaintiffs intended to do.

The sale was an "out and out" sale, and although it was arranged that the defendant was to sell ostensibly as the agent of the plaintiffs, no real agency was intended to be or was in fact created.

The defendant objected to the plaintiffs' recovering for the price of the ale, because, as she alleged, the plaintiffs had no provincial license authorizing them to sell, and because the ale was supplied to her for the purpose of its being sold by her in contravention of the provisions of the Ontario Liquor License Act.

The learned Chief Justice refused to give effect to the objection, holding that apart from the question as to the purpose for which the ale was supplied, there was nothing to prevent the plaintiffs' recovering; that the sale having been made at the plaintiffs' brewery was lawfully made there, although to a person who had no license to sell under the Ontario Act, and in that conclusion, I entirely agree for the reasons stated by the learned Chief Justice, which it is unnecessary that I should repeat.

He also held that the conversation as to the position of the defendant with regard to a license having taken place, as he found that it did, after the sale of the ale had been made, the sale was a perfectly legal one, and that the plaintiffs could not be said to have made it for the purpose of the goods sold, being resold by the buyer without a license, and that the sale was not, therefore, a contravention of the Liquor License Act.

I am unable to agree with the learned Chief Justice as to this branch of the case.

It is well settled, whatever may be the law where there is on the part of the seller merely knowledge that the buyer

Judgment.

MEREDITH,  
C.J.

Judgment.

MEREDITH,  
C.J.

intends to apply the subject matter of the sale to an illegal purpose, that where there is a participation by the seller in the illegal purpose and intention of the buyer, or anything is done by the seller in furtherance of them, he is not entitled to recover the price: *Hagar v. O'Neil*, 21 O. R. 27; *S. C.*, 20 A. R. 198, and cases there cited; *Benjamin on Sales*, (6th Amer. ed., pp. 504 *et seq.*); *Ritchie v. Smith*, 6 C. B. 462.

It is, in my opinion, hardly correct to say as the learned Chief Justice did, that the sale was made before the conversation as to the license took place; the bargain was not, as I view the evidence, concluded until after the arrangement as to the use by the defendant of the plaintiffs' license was made; and that arrangement was a term of the bargain which was concluded between the parties: but even if a binding contract of sale had been made, of which I can find no evidence, the delivery of the ale took place after the knowledge of the illegal purpose to which the defendant intended to apply it, and was made for the purpose of enabling her to carry out that object, and that, in my opinion, is sufficient to prevent the plaintiffs recovering: *Cowan v. Milbourn*, L. R. 2 Ex. 230; *Pringle v. The Corporation of the Town of Napanee*, 43 U. C. R. 285.

There was, as I have pointed out, not only knowledge by the plaintiffs that the defendant intended to sell the ale in contravention of the Liquor License Act, but it was expressly stipulated that the plaintiffs should assist her in carrying out her illegal purpose, by allowing her to use their license and to appear to sell as their agent; that, in my opinion, was clearly a participation by the plaintiffs in the illegal purpose and intention of the defendant, which, according to the cases to which I have referred, prevents their recovering in this action.

It was urged by Mr. Buell, that the plaintiffs in good faith believed that they might lawfully agree that the defendant should sell the ale as their agent and under their license; but assuming good faith on their part, that can, I think, make no difference; the act of the defen-

dant in selling, would be none the less a violation of Judgment.  
the Liquor License Act, and ignorance of the law affords MEREDITH,  
no excuse. C.J.

The case of *Waugh v. Morris*, L. R. 8 Q. B. 202, cited by Mr. Buell, is, I think, quite distinguishable; there the contract might have been performed according to its very terms, without anything illegal being done, and the language of Mr. Justice Blackburn, at p. 208, as to *mens rea*, must be read with that in view. All that I understand him to mean is, that where it is possible to perform the contract without violating the law, an intention to perform it in a way which would involve an infraction of the law, must be shewn. In this case, the carrying out of the bargain between the parties, must necessarily have resulted in a contravention of the Liquor License Act, and *Waugh v. Morris*, has, therefore, no application.

It was further urged by Mr. Buell, that inasmuch as, as he contended, the plaintiffs could make out their case, otherwise than through the medium and by the aid of the illegal transaction, they were entitled to recover; but if as I think it was a term of the bargain for the ale, that the plaintiffs should assist the defendant in carrying out her illegal intention by the arrangement as to the license and the nominal agency, the plaintiffs having to prove the whole contract, must, in proving it, have disclosed that term of the bargain, and are not within the rule, the aid of which they invoke.

The appeal must, therefore, in my opinion, be allowed, and the judgment of the learned Chief Justice reversed, and judgment be entered, dismissing the plaintiffs' action.

The defence is not a meritorious one. The agreement which enabled the defendant to apply several hundred dollars worth of the plaintiffs' property to her own use without paying for it was brought about by her agent and for her benefit, and while we are compelled to give effect to her objection, there is nothing to prevent our discretion as to costs being exercised by withholding costs from her;

Judgment. and in my opinion they should not be given to her, but  
MEREDITH, the allowance of the appeal and the dismissal of the action  
C.J. should be without costs.

ROSE, J. :—

I agree to all the findings of fact of the learned trial Judge and his deductions therefrom, subject to the following question: Did the delivery of the goods after knowledge of the intention to sell them without a license, prevent the plaintiffs recovering the price of the goods?

I agree that the sale of the goods was completed before knowledge was acquired. The learned Chief Justice, the trial Judge, having given credit to the plaintiffs, there is no reason why, as it seems to me, the finding of fact upon that point should be interfered with; but it is manifest upon the evidence that the goods were delivered after the plaintiffs had acquired knowledge of the defendant's illegal intention. I do not think that it can be fairly said that the plaintiffs knew that what the defendant intended to do, and what the plaintiffs agreed to assist the defendant in doing was illegal. I should think the fair inference of fact is, that both parties thought that the plan to which they were resorting, was a compliance with the statute, and that the defendant might legally sell the goods purchased from the plaintiffs, if they were appointed agents for the plaintiffs, by which the parties meant that the defendant should sell the plaintiffs' goods only, and the plaintiffs should supply none but the defendant in Ottawa with such goods. But the case of *Cowan v. Milbourn*, L. R. 2 Ex. 230, seems to me to be an express authority that the delivery of the goods having been made with knowledge of the illegal intent the plaintiffs may not recover. In that case the defendant contracted to let rooms to the plaintiff. Afterwards discovering that they were intended to be used for the delivery of lectures maintaining that the character of Christ is defective, and His teaching misleading, and that the Bible is no more inspired

than any other book ; he refused to allow the use of them, but did not assign this as a reason for his refusal.

Judgment.  
Ross, J.

In an action for breach of the contract, it was held, first, that the publication of such doctrines was blasphemy, and that, therefore, the purpose for which the plaintiff intended to use the rooms was illegal, and the contract one which could not be enforced at law.

Secondly, that the defendant was entitled to justify his refusal on this ground, notwithstanding his having assigned a different reason.

Kelly, C. B., at p. 234, said : " I, therefore, do not hesitate to say that the defendant was not only entitled, but was called on and bound by law to refuse his sanction to this use of his rooms." Bramwell, B., said, at p. 235, " If the defendant had known his purpose at the time of the refusal, he clearly would not have been bound to let the plaintiff occupy them, for if he would, he would then have been compelled to do a thing in pursuance of an illegal purpose. Neither if he had let the plaintiff into possession, could he, for the same reason, have recovered the price for their letting."

Here, although the sale was complete, the contract was not executed by the delivery of the goods at the time that the plaintiffs learned of the illegal purpose. As soon as such purpose was known, I think it was the duty of the plaintiffs to refuse to deliver, and having delivered with such knowledge, they are unable to recover the price.

I have had some difficulty in making up my mind to concur in the suggestion of the learned Chief Justice that the action should be dismissed without costs.

The defence is one which is encouraged on the ground of public policy, and in one view it seems anomalous that while the Courts are bound to permit the defence and give effect to it because it is against public policy to permit such contracts to be enforced by the Courts, yet at the same time the Court should be at liberty to fine the defendant to the amount of his costs as for misconduct in setting up the defence ; and in an ordinary case where the



**Judgment.** plaintiff was cognizant of the illegal purpose, and assisted the defendant to carry such purpose into effect, I should think the Court should not refuse costs. Here, however, it may be fairly enough said that the plaintiffs did not know that they were doing an illegal act, or were assisting the defendant to do an illegal act, and the defendant having set up a defence for the purpose of avoiding payment of a very considerable sum apparently due and owing to the plaintiffs apart from such defence, I think the defendant may well be left to pay her own costs out of the plaintiffs' property which she has in hand.

For these reasons, I concur in the result arrived at by the learned Chief Justice, and agree that the action must be dismissed without costs.

**MACMAHON, J. :—**

I agree in the result.

A. H. F. L.

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## SORNBERGER ET AL. V. CANADIAN PACIFIC R. W. CO.

*Evidence—Negligence—Bodily Injuries—Exhibition to Jury—Surgical Testimony—Inflammatory Address to Jury—Absence of Objection at Trial—Excessive Damages.*

The plaintiff in an action for bodily injuries may exhibit them to the jury for the purpose of having the nature and extent of the damage explained by a medical witness.

Review of American authorities on this subject.

The exhibition of injuries which have happened to another person, for the purpose of contradicting evidence given on behalf of the plaintiff in such an action, is not permissible unless competent evidence is forthcoming to explain their nature; but even with such evidence, *quere*.

Where complaint is made that counsel at the trial has improperly inflamed the minds of the jurors by remarks addressed to them, objection must be lodged at the time the remarks are made, and the intervention of the trial Judge claimed; and where this has not been done, the Court will not interfere upon appeal.

The injuries having been severe and caused much suffering, a verdict of \$6,500 was not one that should be disturbed as excessive.

Judgment of ARMOUR, C. J., affirmed.

THIS was an appeal by the defendants from the judgment pronounced at the trial by ARMOUR, C.J., on the 17th November, 1896, at the Whitby Assizes, in favour of the plaintiff Charles Sornberger for \$6,500, and in favour of the plaintiff Lelah Sornberger for \$500, to be paid into Court for her benefit, she being an infant; and a motion to set aside the verdict of the jury for such amounts and for a new trial. Statement.

The action was brought by the two plaintiffs, who were father and daughter, to recover damages for injuries received by them by being struck by a train of the defendants on the 20th February, 1896, when crossing in a sleigh the railway track of the defendants at a road-crossing near the farm of the plaintiff Charles Sornberger. The negligence alleged against the defendants was the failure to sound the whistle or ring the bell of the engine on approaching the crossing. Both the plaintiffs were injured, the father's leg being broken, in addition to other injuries.

The appeal and motion for a new trial were upon the following grounds:

**Statement.**

1. That the verdict of the jury and judgment entered thereon were contrary to law, evidence, and the weight of evidence.

2. That the damages awarded were excessive.

3. That the trial Judge erred in (a) allowing the plaintiff to exhibit and keep exhibited his leg to the jury; (b) in rejecting the evidence of a witness tendered on behalf of the defendants.

4. That the address of counsel for the plaintiffs was highly improper and calculated to inflame the feelings of the jury on behalf of the plaintiff, who was alleged to be a poor man, against the defendants, who were alleged to be a wealthy corporation, and well able to pay any verdict which the jury might find.

At the trial, in the course of the examination of a witness for the plaintiffs, a surgeon who had attended the plaintiffs for their injuries, the witness stated that he could describe the nature of the injury much more readily and satisfactorily if he had the injured leg of the male plaintiff to shew in Court, exposed, and the plaintiffs' counsel proposed that the leg should be exposed for this purpose, which was strongly objected to by counsel for the defendants, on the ground that the jury would be prejudiced by the exhibition, and moreover that the injured leg was not evidence of the injury.

The learned Chief Justice allowed the witness to do as he proposed, being of opinion that, although the leg was not evidence so far as its appearance was concerned, it was permissible for the witness to use it to explain where the injuries were and their nature, his reasons being more fully stated to the jury in that portion of his charge hereafter set out.

One of the medical witnesses for the plaintiffs gave evidence to the effect that after a compound comminuted fracture had happened, a leg so injured would never improve so that the subject of the injury would be able to do farm work; and the defendants' counsel proposed to call as a witness a person who was alleged to have had

such a fracture, and to have subsequently worked on a farm, but the learned Chief Justice refused to allow the witness to be called for the purpose mentioned, unless the surgeon who set the leg was called to explain the case. Statement.

The following is the portion of the charge to the jury relating to the exhibition of the leg:—

“With regard to the appearance of the leg; I have to say a word or two about that, because objection was taken to the plaintiff shewing his leg, not for the purpose of giving you evidence of the leg, but for the purpose of enabling the doctor to explain to you clearly the nature of the injury to the leg, the places at which the injury took place, and the particular injury that took place at each part of the leg that was injured. No objection was taken to the little girl being brought into Court and the scar on her face shewn. No objection was taken to the plaintiff shewing where his nose was broken. But when it came to the leg, there was every objection to shewing his leg. If it was not the practice to wear trousers, and men went without anything on their legs, I suppose a man could come into Court and no objection of that kind would be raised. But it is said that some Court at some time determined that a man could not shew his personal injury to a jury. I apprehend it was only said that that could not be evidence for the jury. They could not rely upon their looking at the injury as evidence at all. But I do not think it was said that a man could not shew his wound or his injury for the purpose of the doctor explaining to the jury where the injury was and what its nature was. Now so far as the leg is concerned, it is no evidence; the appearance of the leg is no evidence for you at all. You must not look at the leg and draw any conclusion from the appearance of the leg or from the leg itself. It is only from the evidence of the doctor, who asked to see the leg in order that he might explain the nature of the injuries more clearly to you, and more satisfactorily to you, than he could do not having the leg to point out the different injuries. There

Statement. could not be any objection to his having the skeleton of the bones of the leg and demonstrating upon the skeleton where the injuries were and of what nature they were, but it is said that the leg itself he cannot demonstrate from. Well, I ruled that he could. I may be wrong, and if so I shall be corrected hereafter. But I tell you that the leg is not evidence, or the appearance of it, and you are to draw no conclusion from that. Your conclusion is to be drawn from the evidence of the doctor, who uses the leg merely for the purpose of explaining to you where the injuries were and of what nature they were."

An affidavit of the defendants' solicitor, filed upon the appeal, stated that counsel for the plaintiffs in opening the case to the jury referred to the amount claimed, \$18,000 for Charles Sornberger, and \$2,000 for Lelah Sornberger, as being a very trifling sum, and one which the defendants, a wealthy corporation, whose system extended from the Atlantic to the Pacific, were well able to pay; that, in addressing the jury at the close of the evidence and before the charge, counsel for the plaintiffs enlarged upon the enormous wealth, power, and resources of the defendants, saying, amongst other things, the following:—"These are the people to whom your millions were contributed by the Government, one of whose directors has already become a lord and moved to England and purchased himself a baronial castle. Their president, Sir William Van Horne, enjoys a salary of \$50,000 a year; he rides in a private car with half a dozen attendants. If you give a verdict for \$15,000 or \$20,000, the letter goes to Montreal and will be received in the head office by Sir William, who will turn in his easy chair and say, 'how well Nesbitt has done, how cheaply Nesbitt has got us off;' a cheque will be brought into him by a clerk; he will sprawl his signature over it, hand it back, and it will be paid as a pure matter of routine, and there will be nothing more about it; not one dollar less of Sir William's \$50,000; nobody will lose an hour's sleep; and there will be just as many banquets,

just as many Pullman cars, just as many palaces as before. Statement.  
Mr. Nesbitt insultingly told you that poor Sornberger had a mortgage on his farm for \$5,000. He was right. He has a mortgage on his farm, and it is three years in arrear, as he also told you. He has to pay that mortgage. When he gave that mortgage he could get a dollar a bushel for his wheat, and now it is only fifty cents, but the freight is just as high. If you give him \$10,000, \$5,000 of it has to go to the mortgage, and he will only have \$5,000 left, and, with money not worth more than four and a half per cent. interest, it is not enough to live on. You, gentlemen, are no doubt poor like myself, and you cannot afford, when you come to Myrtle to take a train to Toronto, to do more than pay your first-class fare. You can afford to look in but not to travel in one of the defendants' luxurious Pullman cars. But, gentlemen, behind that car there is another, a private car, where a man, one of the directors, sits surrounded by half a dozen attendants, and which you cannot even look into. What does a verdict of a few thousand dollars mean to these defendants? The millions are there. Sornberger has been injured by their neglect; he should be given enough to live upon."

In answer to this the affidavit of the plaintiff Charles Sornberger was filed, in which he said that he had heard the addresses of his counsel to the jury; that he had read the affidavit of the defendants' solicitor, and had no hesitation in saying that the allegations therein contained with reference to the address were in many respects incorrect and a perversion and misstatement of what took place; that much of the language stated therein was never used, and what language was used had been tortured to give a meaning which it would not fairly bear, as would appear from a full report of the addresses of counsel at the trial; that he had applied to the stenographer who was present at the trial for a copy of such addresses, but had been informed that he did not take them down in shorthand; that the plaintiffs' counsel did not urge upon the jury that they should give a large verdict upon the ground that the

**Statement.** defendants were a wealthy corporation, or that its directors were wealthy ; that no objection was made by counsel for the defendants to anything said to the jury ; that no dissent was made to anything said by counsel for the plaintiffs ; and when, after the trial Judge's charge, he asked counsel for the defendants if he had any objection thereto, the latter said he had not ; that counsel for the defendants did not ask the trial Judge to make a correction of anything said by counsel for the plaintiffs ; and the deponent believed that the ground of exception now taken on the part of the defendants was an afterthought ; that counsel for the plaintiffs did not refer to the amount claimed as a trifling sum which the defendants were well able to pay, nor did he appeal for a verdict on that ground ; that the question as to the ability of the defendants to pay was one of the defendants' own raising, and was first raised by the counsel for the defendants, who told the jury that they must remember that poor widows and orphans owned the stock in the defendants' company, and that they must consider that the poor widows and orphans would pay this verdict. The affidavit went on to controvert other statements made in the affidavit of the defendants' solicitor. The plaintiff Charles Sornberger, being cross-examined upon his affidavit, admitted that several of the remarks deposed to by the solicitor for the defendants had been made by the counsel for the plaintiffs in addressing the jury at the trial, but denied that others had been made.

The appeal was argued before the second division of the Court of Appeal composed of BOYD, C., and FERGUSON and ROBERTSON, JJ., on the 10th and 11th March, 1897.

*Wallace Nesbitt*, for the defendants. The chief ground of the appeal is that the address in reply of counsel for the plaintiffs inflamed the minds of the jury. This is a good ground for a new trial : *Forwood v. City of Toronto*, 22 O. R. 351 ; *Willis v. McNeill*, 57 Tex. 465 ; article in 14 Central Law Journal 406 ; *Brown v. Swineford*, 44 Wis. at p. 292 ; 4 Am. & Eng. Encyc. of Law, p. 875, "Crim-

inal Procedure;" *Rolfe v. Rumford*, 66 Me. 564; *Gibson v. Zeibig*, 24 Missouri App. 65; *Rochester v. Shaw*, 100 Ind. 268. When counsel goes beyond what is proper in addressing the jury, it is the duty of the Court to interpose, and if the trial Judge does not, how can the opposing counsel? When such statements have been made to the jury, an objection will be of no avail; the mischief has been done. If it is held that an objection should have been made at the trial, it comes down to a question of costs. Relief can be granted now upon such terms as the Court sees fit to impose. It is not like misdirection, or the improper admission of evidence; the trial Judge can remedy that, and his attention must be called to it. Then as to the exhibition of the leg to the jury, that was improper: see Taylor on Evidence, 9th ed., vol. 1, p. 365; Phipson's Law of Evidence, p. 3, and a case there cited of *Curtler v. London Tramway Co.*, London Times, 11th February, 1891, per Wright, J.; *Laughlin v. Harvey*, now standing for judgment before the other division of the Court of Appeal. If the plaintiff's leg was properly shewn to the jury, then the defendants should have been allowed to shew the other man's leg. We could have had it explained by a surgeon; there was one in Court; not the surgeon who set it, but another. The defendants will be content if the damages are reduced to \$3,500. Otherwise, there should be a new trial. See *Dancey v. Grand Trunk R. W. Co.*, 19 A. R. 664.

*C. J. Holman*, for the plaintiffs. The address on behalf of the plaintiffs at the trial was not of an inflammatory nature; such remarks as were made in reference to the defendants were brought upon them by the allusions of counsel to the mortgage on the farm and the widows and orphans who owned the Canadian Pacific stock. But, in any case, the defendants did not object at the trial, and cannot be heard to object now. I refer to *McDonald v. Murray*, 5 O. R. 559; *Willis v. McNatt*, 75 Tex. 69; *Scott v. Chicago, etc., R. W. Co.*, 68 Iowa 360; Thompson on Trials, vol. 1, secs. 957-962. The exhibition of the leg to the jury was only for the pur-



Argument. pose of an explanation by the surgeon. The trial Judge carefully explains this in his charge. The evidence of the witness who had a broken leg was excluded because there was no one to explain it. The Court will not interfere as to the quantum of damages: *Phillips v. London and South Western R. W. Co.*, 5 C. P. D. 280; Wood on Railroads, ed. of 1894, vol. 2, p. 1406; Hilliard on New Trials, 2nd ed., p. 578; *Creed v. Fisher*, 9 Ex. 472; *Praed v. Graham*, 24 Q. B. D. 53.

*Nesbitt*, in reply.

April 12, 1897. BOYD, C.:—

Prior to the Ontario statute 54 Vict. ch. 11, there was no power in this Province to order a compulsory examination of the person of one claiming damages for bodily injury. This Act was passed to give that power after the decision in *Reily v. City of London*, 14 P. R. 171, in which such an order was refused. Since then this power has been more than once usefully exercised in detecting pretended or exaggerated injuries, and it is an extension of the advantages of discovery which is in universal favour in the American States, though in a lesser degree in England.

Now, as a correlative, the question has arisen in this case as to the right of the plaintiff to present in evidence for himself the injured member, in order to explain the nature and extent of the damage before a jury.

The American decisions decidedly uphold the right to do so as a piece of real evidence; in England there is a strange silence on the subject; only one case is to be found, which is merely noted in the Times newspaper of 15th February, 1891, and not reported, wherein Mr. Justice Wright refused at *nisi prius* to permit a wound to be shewn to the jury. I confess that I see no objection whatever to the rule of practice which obtains in the Courts of the Union; tersely expressed in a late case in Illinois thus: it is within the discretion of the Court to allow the plaintiff to exhibit to the jury his injured limb or body for the purpose

of being examined thereon by a physician: *City of Lanark v. Dougherty*, 153 Ill. 163 (1894); and again in *Citizens' Street R. R. Co. of Indianapolis v. Willooby*, 134 Ind. 563 (1893), the Chief Justice says: "The physician who exhibited the plaintiff's injuries to the jury could have described them without such exhibition, but it is plain that by such exhibition the jury obtained a clearer idea of his condition than they could have obtained by a mere description." In *Mulhado v. Brooklyn City R. R. Co.*, 30 N. Y. 370, one of the first cases, in 1864, the Court combats, I think successfully, the objection that the sight of the wounded or injured member will unduly influence the feelings and sympathy of the jury.

Judgment.  
Boyd, C

The general rule of evidence to this effect is recognized by the Court in *Graves v. City of Battle Creek*, 95 Mich. 266 (1893), and by the Supreme Court of the United States in *Union Pacific R. W. Co. v. Botsford*, 141 U. S. 250. Among most recent cases are noteworthy: *Currico v. West Virginia Central R. W. Co.*, 39 W. Va. R. 86, with a valuable note by the President, at p. 107; and *Freeman v. Hutchinson*, 43 N. E. R. 16. The American authorities are well collected in the last edition of Taylor on Evidence, 1897, vol. 1., part 3, ch. 1, p. 365 *et seq.*, Chamberlayne's Notes.

The ruling of the Chief Justice at the trial on this head of evidence appears to me unexceptionable, and indeed more restricted against the plaintiff than would be warranted by American decisions. He said: "You must not look at the leg and draw any conclusion from the appearance of the leg or from the leg itself. It is only from the evidence of the doctor, who asked to see the leg in order that he might explain the nature of the injuries more clearly to you and more satisfactorily to you than he could do without having the leg to point out the different injuries," and so on.

He was equally correct, I think, in rejecting evidence offered, or rather suggested, in regard to a man who had had some injury of the leg, and it was asked that this might be exhibited on the part of the defendants as a sort of offset to the other. But the Chief Justice refused to

Judgment. let this be done unless competent evidence was forthcoming to explain the nature of the injury which that man's leg had sustained. I doubt whether the evidence would, even with such explanation, be competent, for the breaking and healing of one man's leg cannot afford much evidential light upon the breaking and healing of another man's, *i.e.*, the plaintiff's, which is the real subject of investigation.

BORD, C.

Then the defendants moved for a new trial on the ground of the license of speech on the part of the plaintiffs' counsel in his address to the jury, inasmuch as he went into irrelevant matter which would tend to warp their judgment and aggravate the damages. But no objection was lodged at the time by the defendants—no appeal was made to the presiding Judge, who was there for the very purpose of seeing that the trial was duly and properly conducted, and whose intervention should have been claimed while the alleged transgression was being committed. It is a practice not to be encouraged to allow matters eminently proper to be disposed of by the Judge to be passed over *sub silentio* before him, and then made subjects of complaint in an appellate forum: *McDonald v. Murray*, 5 O. R. at pp. 575 and 582. He, present, hearing and seeing, can best rule as to whether there has been an undue invasion of the large privileges of counsel addressing the jury; and if the best and most immediate remedy of closure or the like is not invoked before him, it must be taken that the gravity of the situation was not so serious at the time of the address as it afterwards looms up in the light of the verdict.

But upon the mere amount of damages in this case we cannot interfere; they are substantial, no doubt; but the man was badly injured and suffered much, so that the jury were not so obviously wrong that their verdict should be disturbed.

Altogether then the appeal fails, and the judgment below is affirmed with costs.

FERGUSON and ROBERTSON, JJ., concurred.

E. B. B.

## FAIRBANKS V. THE TOWNSHIP OF YARMOUTH ET AL.

*Railways—Municipal Corporations—Overhead Bridge—Approaches Thereto—Unlawful Incline—Accident—Liability to Repair—Railway Act of 1888—51 Vict. ch. 29, sec. 186, (D.)—55 Vict. ch. 42, sec. 531, (O.).*

A railway company, with the sanction of a township municipality, erected an overhead bridge across a highway, and afterwards, without the consent of the municipality, raised the same so as to cause the approaches thereto to be at a greater incline than prescribed by the Railway Act, 1888, 51 Vict. ch. 29 (D.). An accumulation of snow resulted from this, against which the plaintiff's cutter was upset, and she sustained injuries for which she brought this action :—

*Held*, that the accumulation of snow amounted to a want of repair under section 531 of the Municipal Act, 55 Vict. ch. 42 (O.), for which the municipality was liable :—

*Held*, also, that the railway company was also liable for a misfeasance in raising the bridge and approaches so as to be at a greater incline than prescribed by section 186 of the Railway Act, 1888, thus causing the obstruction by means of which the accident happened.

THIS was an appeal by the Michigan Central Railroad Company from the judgment of BOYD, C., of February 13th, 1896, refusing the appellant's motion for a non-suit at the trial of this action at St. Thomas, which was brought against the township of Yarmouth, and the Michigan Central Railway Company, under the circumstances which are set out in the judgments, (especially in that of MACMAHON, J.) and by way of appeal from the Chancellors' directions that judgment should be entered for the plaintiff for \$1,000, with costs against the appellants, upon the answers of the jury to the questions submitted. Statement.

The township of Yarmouth also appealed from the judgment of the Chancellor on the ground that the verdict was against law and evidence, and that the Chancellor had no jurisdiction to vary, as he had done, the judgment delivered by him at the trial, which was against the Michigan Central Railroad Company only, by directing that the same should be entered also against the appellants.

The plaintiff also served notice of cross-appeal upon the ground that the corporation of the township of Yarmouth was primarily liable, and that judgment should have been given against both defendants, and that the question of the

**Statement.** Liability of the railway company to the township corporation was one in which the plaintiff was not interested, and that the plaintiff was entitled to the costs of the action against the corporation.

The appeals were argued on October 6th, 1896, before the second division of the Court of Appeal, composed of MEREDITH, C. J., and ROSE, and MACMAHON, JJ.

*Dyce Saunders*, for the appellants, the railway company. The sole question as far as we are concerned is, were we bound to repair, and is the accumulation of snow a want of repair? We say we are not responsible for anything but a structural want of repair. The accident was no doubt caused by the drift of snow, but there is nothing to connect that with any action for which we are responsible. It could never have been in the contemplation of the municipality and the railway company, when the by-law was passed, that the latter should be liable in such an action as this. In *Vanallen v. The Grand Trunk R. W. Co.*, 29 U. C. R. 436, there was a structural defect. We admit we are liable to maintain the structure as we placed it there. [MEREDITH, C. J.—Perhaps the structure was an unlawful structure.] No. Section 90 of the Railway Act, 1888, sub-sec. g, 51 Vict. ch. 29 (D.), authorizes it. We are not liable for mere nonfeasance: *Municipality of Pictou v. Geldert*, [1893] A. C. 524; *Sanitary Commissioners of Gibraltar v. Orfila*, 15 App. Cas., at p. 411; *Municipal Council of Sydney v. Bourke*, [1895] A. C. 433. Sub-secs. (h), (p) and (q) of sec. 90 of the Railway Act, 1888, may also be referred to. In none of them is there more than a permissive power given. It must be shewn that we did something that caused the drift to make us liable to the plaintiff. But we did nothing in raising the bridge and constructing the fence but what we were authorized and called upon to do. As to maintaining a crossing see *Cameron v. Wellington, Grey and Bruce R. W. Co.*, 28 Gr. 327, which decides that it does not include keeping a crossing free from snow; see especially at p. 332.

*J. A. McLean*, for the township of Yarmouth. We contend the Chancellor had no jurisdiction to vary his judgment as he did.

*W. A. Nesbitt*, for the plaintiff. The cause of the accumulation of snow was the building of the bridge at the grade it was, and building the fence of the character it was : see the Railway Act, 1888, sec. 91, 51 Vict. ch. 29 (D.). They had an unlawful bridge there : *Sibbald v. Grand Trunk R. W. Co.*, 18 A. R. 184, 20 S. C. R. 259. There was a contravention of sections 184, 185, and 186. The construction as it stands there to-day is not authorized by law, and the accident arose from the faulty construction : *Meade v. Township of Etobicoke*, 18 O. R. 438. As to our rights against the municipality : *Payne v. Rogers*, 2 H. Bl. 350 ; *Nelson v. The Liverpool Brewery Co.*, 2 C. P. D. 311. The fact that the railway is liable does not relieve the municipality : *The City of Halifax v. Lordley*, 20 S. C. R. 505, 512. Counsel for the railway has travelled beyond the record.

*Saunders*, in reply. *Payne v. Rogers* and *Nelson v. The Liverpool Brewery Co.*, are landlord and tenant cases, and their principle has not been extended. The bridge was not unlawful ; and they have not connected the drift with any unlawful action of the company.

March 1st, 1897. MACMAHON, J. :—

The action is to recover damages for injuries sustained by the plaintiff on the 23rd of February, 1895, while with her husband, who was driving a horse and cutter along a public highway known as the Talbot road in the township of Yarmouth, upon the approach to a bridge known as the Talbot road overhead bridge, the cutter having struck a mass of ice and snow, which it was alleged had been allowed to accumulate and remain on such overhead bridge and the approach thereto, by reason whereof the cutter was upset, and the plaintiff thrown out and thus injured.

**Judgment.****MACMAHON,**  
**J.**

The defendants, the township of Yarmouth, had on the 28th of May, 1883, passed a by-law sanctioning the diverting by the railway company of a portion of the Talbot road, and to raise the same, and construct an overhead bridge across the tracks of the company's line of railway, with suitable approaches thereto.

The by-law provides (clause 1), "That the bridge shall be built in a thoroughly strong and secure manner, \* \* and shall be maintained in good repair at the costs and charges of the railway company. And that the approaches to the said bridge shall be not less than twenty-five feet in width, and on a gradient of not less than one foot vertical to twenty feet horizontal as provided by the Railway Act, 1879, sec. 15, sub-sec. 4."

3. "That the said company shall be responsible at their own costs and charges, for any damages, or claims of any individual, or individuals, which may at any time or times lawfully arise, or be made on account of the said alterations and diversions, whether such claims for damages shall be direct or otherwise."

The by-law provided that the assent to such diversion should first be obtained from the St. Thomas and Aylmer Gravel Road Company. And on the 1st of September, 1883, an agreement was entered into between the St. Thomas and Aylmer Gravel Road Company and the railway company, one of the provisions of which was, "That a close board fence shall be erected (by the railway company) between the (railway) yard and the new road, wherever the road borders on the tracks."

There is no decided conflict in the evidence as to the condition of the bridge and the approach thereto from the north at the time the accident happened to the plaintiff. There was a bank of snow stated by the majority of the witnesses at the trial as being from fifteen to twenty feet in length, of which from ten to fourteen feet was on the bridge, and from five to eight feet on the northerly approach thereto, and being some six feet in width, and from two to three feet in height.

The plaintiff's husband was driving in a cutter shortly after six o'clock on the morning of the 23rd of February, and as there is in approaching the bridge from the north a sharp curve to the west or right hand side, he kept his horse on that side, and not noticing the extent of the snow-drift drove one runner of the cutter over it, causing the cutter to upset, throwing the plaintiff out, and so injuring her.

Judgment.  
MACMAHON,  
J.

In the year 1894 the railway company, without the assent of the township, raised the centre of the bridge about fifteen inches, and the grade to the approach on the north side was in consequence increased from one in twenty to one in thirteen—the statutory grade being what the by-law required.

Some of the witnesses stated that the raising of the bridge together with the high board fence erected on each side of the approach caused the snow to accumulate on the bridge and approach, at the place where the accident happened, and if allowed to remain banked up it would be dangerous to vehicles passing over that part of the highway. And Henry Dunsford, a dairyman who had lived in the vicinity of the bridge for six years, and drove over it nearly every day, was called as a witness by the railway company, and he stated that prior to the raising of the bridge he had not seen any snow bank there, although he said there might have been a slight one.

The snow bank causing the accident had formed in January.

In answer to questions submitted by the learned Chancellor the jury found—

1st. That there was no contributory negligence on the part of the Fairbanks; that he exercised reasonable care in driving.

2nd. That the piling up of snow at the bridge was dangerous to travel.

3rd. That the defendants had notice of the snow bank.

4th. And to the question as to which of the defendants (the township or the railway) was most to blame, they answered, "We consider the railroad to blame."



**Judgment.****MACMAHON,**  
**J.**

The damages were assessed by the jury at \$1,000.

The learned Chancellor made the following memorandum on the record : " Verdict for \$1,000 against the defendants the Michigan Central Railway. Stay till Term or appeal lodged." He afterwards directed that judgment be entered against both defendants, but reserved the question as to the right to indemnity by the township of Yarmouth against the railway company until after the defendants' appeal should be disposed of.

The principal, in fact, the only ground of appeal argued before us on behalf of the railway company, was that the plaintiff had not established a duty on the part of the railway company to keep the approaches to the bridge in repair, and that the only repair the company was obliged to make to the bridge was when a structural defect existed therein.

Notwithstanding any obligation on the part of the railway company as between it and the municipality to keep the bridge and the approaches thereto in repair, yet the duty of keeping the same in repair, devolves by the Municipal Act, sec. 531, 55 Vict. ch. 42 (O.), on the municipality, and the municipality is primarily liable to this plaintiff: *Traversy v. Gloucester*, 15 O. R. 214; *Mead v. Township of Etobicoke*, 18 O. R. 438; *Carty v. City of London*, *ibid.* 122.

Then was the highway by reason of the snowdrift out of repair? That question must be largely one of fact for the consideration of the jury, having regard to the locality, the size and duration of the drift, and extent of the traffic over the highway. In *Caswell v. St. Mary's and Proof Line Junction Road Co.*, 28 U. C. R. 247, where a snowdrift about two or three rods long and two feet in depth had formed on the gravel road, and had been there for two or three weeks, and owing to the thawing and freezing of the snow, ruts had formed in it which made it unsafe for waggons, it was held there was evidence of negligence on the part of the defendants in not keeping the road in repair, and a verdict for the plaintiff was upheld. *Wilson*,

J., in delivering the judgment of the Court said, at p. 252, Judgment.  
"If snow collects at a spot and by the thawing and freezing the travel upon it become specially dangerous, and if this special difficulty can be conveniently corrected by removing the snow and ice, or by other reasonable means, there must be the duty on the person or body on whom the care of reparation rests to make such place fit and safe for travel." MACMAHON,  
J.

There can be no question as to this locality having become dangerous by reason of the obstruction in the highway caused by the snowdrift, as several sleighs were upset through its existence at that point.

Mr. Saunders urged that although the railway company might be obliged by the terms of the Railway Act to maintain and keep the bridge structure in repair, it was not incumbent on it to keep the approaches thereto in repair by the removal of snow accumulation thereon, and the accident to the plaintiff having happened on the approach, the railway company could not be held liable.

The Railway Act 51 Vict. ch. 29, sec. 90 (g) provides: That a railway may make or construct across, under, or over, any highway it intersects or touches, temporary or permanent bridges; and by section 91, the railway is to restore as nearly as possible to its former state any highway which it diverts or alters, or it shall put the same in such a state as not materially to impair its usefulness.

As pointed out in the judgment in *Vanallen v. Grand Trunk R. W. Co.*, 29 U. C. R., at p. 439, the provisions in our Act are not as clear and explicit as under the English Act, which provides that the railway company, when a bridge is built by it over a highway shall keep the bridge, highway, and approaches thereto in repair. (See *North Staffordshire R. W. Co. v. Dale*, 8 E. & B. 836, and *Great Eastern R. W. Co. v. Hackney Board of Works*, 8 App. Cas., at p. 700, where the provisions of the English Act are referred to and considered.) But notwithstanding our Act is wanting in explicitness in providing what are the duties imposed on a railway company in respect to repairing and main-

**Judgment.** taining a bridge erected by it over a highway, it was held  
**MACMAHON,** in *Vanallen v. Grand Trunk R. W. Co.*, in opposition to  
J. the contention of counsel for the railway, that the company was bound to repair and maintain the bridge. And it is, I think, fairly deducible from the enactment giving power to a railway to change the highway by erecting a bridge, that it was the intention that the railway company should keep in repair, not only the bridge, but the approaches made necessary by the erection of the bridge, and without which the bridge would be useless. That was the view entertained and expressed by Mr. Justice Rose in *Mead v. Township of Etobicoke*, 18 O. R., at p. 442, although when that case was in appeal the learned Chief Justice of the Queen's Bench Division, at p. 447, in giving judgment did not express a pronounced opinion on the point. He said, "It may be that the railway company is bound to maintain and repair the bridge with its approaches," etc.

Section 186 of the Railway Act provides that the inclination of the ascent or descent, of any approach by which a roadway is carried over or under any railway shall not be greater than one foot of rise or fall for every twenty feet of the horizontal length of the approach, unless the Railway Committee directs otherwise; and a good and sufficient fence shall be made on each side of such approach of the bridge or passage connected with it. And as said by Lord Fitzgerald in *Great Eastern R. W. Co. v. Hackney Board of Works*, 8 App. Cas., at p. 700, "when the bridge with its fence walls and approaches was completed, it was intended by the Legislature as a substitute for the piece of public road or public highway which the company had appropriated to the use of the railway." The bridge, as I have already pointed out, would be incomplete and useless without the approaches, and the railway company had to appropriate the highway for the purpose of the approaches, and I think it clear that the company is bound to keep the same in repair.

But even if it could be held on the wording of our statute that the duty to repair the approaches does not

rest on the railway company, and that therefore the company would not, on the authority of *Municipality of Pictou v. Geldert*, [1893] A. C. 524, and *Municipal Council of Sydney v. Bourke*, [1895] A. C. 433, and the other cases cited during the argument, be directly liable to the plaintiff for a mere nonfeasance in allowing the approaches to get in disrepair; the company is nevertheless liable over to the township of Yarmouth by the terms of the contract created by the by-law, under which the company was permitted by the township to divert the highway. The railway company is to be liable "for any damages of any individual which may at any time lawfully arise or be made on account of said alterations and diversion, whether such damages be direct or otherwise." The damage would be "direct" if, by reason of the building of the bridge or the approaches, injury would be caused to the lands or buildings of an adjoining land owner. "Or otherwise" was intended to include, and in my opinion does include any damages indirectly resulting from the change by the railway company in the highway.

Judgment.  
MACMAHON,  
J.

But was the railway company not guilty of misfeasance? In violation of the statute and the by-law the company raised the bridge, increased the grade to one in thirteen, and it was, according to the evidence of a number of witnesses, in consequence thereof that the snow was brought upon the bridge and the approach. The act of the railway company caused an obstruction to be brought upon the highway, and so it was guilty of misfeasance, and the company is directly liable to the plaintiff: *Vanallen v. Grand Trunk R. W. Co.*, 29 U. C. R. 436; *Sibbald v. Grand Trunk R. W. Co.*, 19 O. R. 164, 18 A. R. 184, 20 S. C. R. 259.

But the municipality was not relieved of its obligation under the Municipal Act to see that the highway was in proper repair, and so the township of Yarmouth was equally liable to the plaintiff. But had the township alone been sued, it could under sec. 531 of the Municipal Act, 55 Vict. ch. 42 (O.), have made the railway company a party defendant to the action, and if the obstruction which

Judgment.  
MACMAHON, J. caused the damage was caused by the railway the municipality would have its remedy over against the railway.

The action having been brought against both the municipality and the railway company, Mr. Justice Street, on an application made by the municipality, on the 18th of November, 1895, made an order directing that the question as to whether the railway company is liable under the contract to indemnify the municipality should be disposed of by the trial Judge.

Upon the evidence and finding of the jury, I think the plaintiff is entitled to hold her verdict and judgment against the railway company, and its motion must be dismissed with costs.

The municipality is not, I consider, relieved from liability by reason of the jury's finding, and I think the learned Chancellor properly directed that judgment be entered against both defendants. And, as he has reserved the question of indemnification under the order made by Mr. Justice Street, the appeal of the municipality will be dismissed without costs.

MEREDITH, C. J. :—

We are not concerned in determining the questions raised by these appeals with the rights (if any) of either defendant against the other, except so far if at all, as they affect the right of the plaintiff to recover against the defendants, as the issues on the claim of the defendant municipality against the defendant railway company for indemnity have not been determined, but stand for adjudication by the learned Chancellor after the appeals have been disposed of.

At the close of the evidence given at the trial there was practically no contest as to the highway in question having been so out of repair at the place where the accident to the plaintiff happened as to make whoever was responsible for that condition and answerable to the travelling public for the consequences of it liable to the plaintiff

for the damages which she sustained owing to the accident in respect of which she sues, but the real contest appears to have been as to the liability of the defendant railway company to the plaintiff and to the defendant municipality to indemnify the latter against its liability to the plaintiff.

Judgment.  
MEREDITH,  
C.J.

The place where the accident happened was upon a highway vested in the defendant municipality which had at the request and for the accommodation of the defendant railway company been substituted for a previously existing highway. The tracks of the railway company crossed the highway nearly at right angles, and the highway was carried over the railway by means of a bridge, the sides of which were enclosed by a close board fence of the height of about four feet. The approach to the bridge as originally constructed was not made at the incline required by the Railway Act but at a greater incline, and this was increased owing to the defendant railway company having afterwards raised the bridge about fifteen inches.

The obstruction to the highway which caused the want of repair and the accident to the plaintiff was a bank of snow or snow and ice which had formed upon it immediately north of the bridge, and which extended a considerable distance into the travelled way.

The contention of the defendant municipality, and as to it the plaintiff appears to have made common cause with the municipality, was that this bank had been formed owing to the defendant railway company having raised the bridge to a greater height than that of the road which led to it, aggravated by the making of the close board fence at the sides of the bridge, so that the snow was more easily drifted and piled up on the highway, and that had the approaches been constructed with the proper statutory incline that would not have happened.

The learned Chancellor submitted the following questions to the jury :—

1. Did Fairbanks (the defendant's husband) exercise reasonable care in driving at the time of the upset, or should he have avoided the snow bank ?

**Judgment.** To which the jury answered, "We consider Fairbanks exercised reasonable care in driving."

**MEREDITH,  
C.J.**

2. Was the piling up of the snow at that bridge dangerous to travel?

To which the jury answered, "We consider it was."

3. Had the defendants notice of the snow bank at the bridge?

To which the jury answered "Yes."

4. If you find the road was dangerous and that the plaintiff should recover, which of the defendants (the township or the railway) was most to blame?

To which the jury answered, "We consider the railroad to blame."

5. If you give damages to the plaintiff, how much?

To which the jury answered, "Our award is one thousand dollars."

These answers having regard to the charge of the learned Judge clearly entitled the plaintiff to judgment against the defendant municipality; but the defendant railway company against whom the judgment was entered contends that the findings do not warrant a judgment against it, and says that there was no evidence which ought to have been submitted to the jury as against it.

The form of the fourth question may be open to criticism, but read in connection with what took place at the trial and the charge, it appears to me that the answer to it is in effect a finding by the jury that the snowbank was caused by the action of the defendant railway company, to which I have referred, and that the cause of the accident was that wrongful act of the railway company.

The object of the learned Chancellor in putting the question in the form in which it was put was apparently two-fold—to determine the question between the plaintiff and the defendant railway company and to enable him to have the benefit of the jury's opinion in determining the questions between the defendants.

Viewing the finding of the jury upon the fourth question as it ought, as I have said, to be looked at, the

plaintiff was entitled to judgment against the defendant railway company.

Judgment.

MEREDITH,  
C.J.

The act of the defendant company in constructing and maintaining the bridge and the approaches in direct contravention of the Railway Act, was an unlawful act, and upon the finding of the jury, that act was the cause of the obstruction to the highway, which caused the accident. It is impossible, I think, to say that the learned Chancellor should have ruled that the formation of the snow bank was not the necessary or probable consequence of the defendants' unlawful act. There was evidence that the formation of the snow bank was due to that act, and that such a bank would not only probably but necessarily result from it, and that being so, the case was properly submitted to the jury.

The appeal of the defendant railway company therefore, in my opinion, fails and must be dismissed with costs.

The defendant municipality complains that, although the memorandum which the Chancellor endorsed on the record, was a verdict against the defendant railway company only, he subsequently directed judgment to be entered against both defendants for the damages and costs, and adjudged that as between the defendants, the defendant railway company was primarily liable, and that the question of the rights of indemnification of the defendant municipality against the defendant railway company, should be reserved until after this appeal should be disposed of.

The omission to indorse the verdict as against both defendants, was plainly a mere slip, which the trial Judge had power to correct, and the defendant municipality certainly has no reason to complain of the form in which the judgment was ultimately drawn up, and its appeal must also be dismissed with costs.

The plaintiff's cross-appeal in the view I have taken, was unnecessary, but inasmuch as it was induced by the objection taken by the defendant municipality in their appeal, and if we had been compelled to give effect to that



Judgment.  
MEREDITH,  
C.J.

objection, we should have allowed the cross-appeal so as to give the plaintiff the right which has been given by the amended judgment, it should be dismissed without costs, and the costs which the plaintiff is entitled to on the dismissal of the appeal of the defendant municipality, should not be reduced or lessened owing to all the appeals having been argued together.

ROSE, J.—

I think the railway company liable by reason of its having constructed the work in a manner directly violating the provisions of The Railway Act, 1888, 51 Vict. ch. 29. I refer especially to sec. 186; but sub-secs. 91, 92, 183, 185 and 192, may also be referred to as shewing the provisions guarding the rights of the public. Such unauthorized work having brought about the condition of affairs, which caused the accident, it seems to me that the company must be liable to any one injured by such unauthorized and illegal interference with the highway.

Whether the railway company is or is not liable to keep in repair the bridges and approaches as between itself and the township, I do not think there is anything in the statutes relieving the township from its duty to keep the road in repair. I distinguish for the purpose of considering this question between the bridge and the road passing over it. I do not see how the agreement between the company and the township increases or lessens the plaintiff's rights.

I have no doubt that the learned Chancellor had the right to correct the error or oversight in making his entry in the record of directions for judgment.

I agree to the dispositions of the motions suggested by the learned Chief Justice.

A. H. F. L.

## ROBINSON V. DUN.

*Defamation—Libel—Mercantile Agency—Privilege.*

A mercantile agency is not liable in damages for false information as to a trader given in good faith to a subscriber making inquiries, the information having been obtained by the agency from a person apparently well qualified to give it, and there being nothing to make them in any way doubt its correctness.

*Cosette v. Dun*, 18 S. C. R. 222, considered.

Judgment of *Boyd, C.*, 23 O. R. 21, reversed.

THIS was an appeal by the defendants from the judgment of *Boyd, C.*, reported 28 O. R. 21, and was argued before *BURTON, OSLER, and MACLENNAN, JJ.A.*, on the 18th and 19th of March, 1897. Statement.

*W. Nesbitt*, and *R. McKay*, for the appellants.

*Gibbons, Q. C.*, for the respondent.

May 11th, 1897. *BURTON, C. J. O.* :—

It must be assumed as the law of this Court (until reversed by some higher authority), in regard to the associations known as mercantile agencies, that when particular information is sought for by a subscriber as to the standing and character of a customer in whom the subscriber is specially interested, the publishing of it to that subscriber is a matter of qualified privilege, and whilst recognizing that as the law binding upon us, I quite agree in the opinion expressed by my brother *Osler*, in *Todd v. Dun, Wiman & Co.*, 15 A. R. 85, that these mercantile agencies can claim no higher privilege for their communications than other parties, and that a general publication of defamatory matter to all their subscribers without application would not be privileged.

But the question here is, whether the learned Judge was right in allowing evidence of want of care in sifting the information which they obtained and furnished to the customers to go to the jury as evidence of actual malice, which it was necessary to establish, as he had already held the occasion to be privileged.

Judgment.

BURTON,  
C.J.O.

It does not seem to me that the case referred to of *Blake v. Stevens*, 4 F. & F. 232, establishes any such proposition. That was a case of a barrister editing a book on the law of attorneys, in which he referred to the power of the court in dealing with its own officers in case of misconduct; and he quoted a case, *Re Blake*, reported in the ordinary reports, in which he stated that the attorney had been struck off the rolls for misconduct. The attorney had in fact been found guilty of misconduct, but had been suspended only for two years. It was an inaccurate report of a judicial proceeding, and was, therefore, not privileged.

If the editor had stated that a party guilty of such misconduct would be liable to be struck off the rolls, no action would have been maintainable, but it was like the ordinary case of a report of judicial proceedings, where the statement was not accurate, and therefore not privileged.

Some language used by the late Chief Justice of the Supreme Court, in *Cossette v. Dun*, 18 S. C. R. 222, would seem to be rather opposed to the view taken by this Court of the doctrine of qualified privilege; but the law of libel and slander under the civil law system of Quebec, derived from France, and our own, are essentially different; and in the case in which that language was used the same result would probably have been arrived at in our own Courts, on the ground that the information was voluntarily given to persons who had not sought the information, and even in the case of their clients who were entitled to seek the information it was altogether outside of the matter they were asked to obtain information upon. I think we should have had no hesitation in holding in the Courts of this Province that any communication of the libellous matter to those not interested in the information would be officious and unauthorized, and therefore not protected, though made in the belief of its truth, if false in fact.

The learned Judge, who in that case delivered the judgment in the Court below, points out the difference between the two systems, and remarks: "Under the English system,

if the statements are fairly warranted by any reasonable occasion or exigency and honestly made, such communications are held to be privileged, and are protected for the common convenience and welfare of society;" and the learned Judge, a little further on, quotes Lord Campbell's well-known definition of privilege in the case of *Harrison v. Bush*, 5 E. & B. at p. 348.

Judgment.

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BURTON,  
C.J.O.

I think, therefore, if I may be permitted to say so, that the learned Chancellor was correct in holding that this case fell within that definition, and that the occasion was privileged.

Being so privileged, it follows that, although the statements are defamatory, actual malice must be proved, and the onus of proving this is on the plaintiff.

In an ordinary action all that is meant by malice is the absence of lawful excuse; but when once the Judge has held the occasion privileged, the plaintiff is bound to prove actual malice; that is to say, some ill-feeling towards the plaintiff; or—as it has been somewhere expressed—some mean or crooked motive of which an honourable man would be ashamed.

But the defendant is only entitled to the privilege if he uses the occasion for that reason. He is not entitled to it if he uses it for some indirect and wrong motive, as if for instance he does so to gratify his anger or his malice. Of course, if it is shewn that the defendant knew the report to be false, that is clear evidence of express malice; or even if it be proved that, out of anger or some other improper motive, he has stated as true that which he does not know to be true and he has stated it whether it is true or not, recklessly, by reason of such wrong motive the jury may infer that he used the occasion not for the reason which justifies it, but for the gratification of his anger or other such indirect motive: see *Clark v. Molyneux*, 3 Q. B. D. 237 at p. 246.

As I have said, the onus of proving this is on the plaintiff; it is true the evidence may be either extrinsic, as of previous ill-feeling or personal hostility, or intrinsic, to be gathered from the violence or extravagance of the lan-

Judgment.

BURTON,  
C.J.O.

guage employed, or when the mode and extent of its publication are excessive; but the cases shew that in either case if the evidence adduced is equally consistent either with the existence or non-existence of malice, the Judge should stop the case, for there is nothing to rebut the presumption which has arisen in favour of the defendant from the privileged occasion: see *Somerville v. Hawkins*, 10 C. B. 590; *Taylor v. Hawkins*, 16 Q. B. 308. That it is now admitted to be untrue is no evidence of malice: see *Caulfield v. Whitworth*, 16 W. R. 936.

But the facts tendered as evidence of malice must always go to prove that the defendant himself was actuated by personal malice against the plaintiff, and a mere mistake innocently made through excusable inadvertence cannot in any case be evidence of malice.

In the present case, it is shewn that the defendant had no personal acquaintance with the plaintiff, and had never had any difference of any kind with him—his agent or traveller had obtained the information, which was the subject of the libel, from a respectable man, a banker, who unfortunately made a mistake, the information he had received and communicated having reference to another person of the same name. There was nothing in the nature of the information to create any doubt as to its correctness, and, if correct, it was a fit matter to be communicated to the party making the enquiry.

In addition, the plaintiff in his evidence disclaimed any attempt to fix the defendant with express malice; and there was no evidence of any sort tending to shew such malice, and the defendant, on the mistake being shewn, at once apologized and made the necessary correction, and no evidence of any damage was given.

Looking at the serious consequences to the commercial community, and to individual traders, by the circulation of false reports as to their standing, too great care cannot be exercised by these associations in the mode of collecting information, and in the selection of reliable agents, and the law naturally watches them with jealousy; an

unfair report may lead to the absolute ruin of a trader previously doing a prosperous business ; but in the present case, no such serious consequences followed, the mistake was soon discovered, and as soon as made known to the defendant he expressed his regret and made the necessary correction, and no damage was proved to have been sustained by the plaintiff by reason of the report ; and I think he would have been better advised if he had rested satisfied with the apology, for he has, in my opinion, failed to satisfy the onus that was upon him of shewing that the defendant was actuated by express malice, and I think that a judgment should have been entered for the defendant.

Judgment.

BURTON,  
C.J.O.

We were referred, since the argument, to *Smith v. Matthews*, 55 Alb. L. J. 202, but it has no bearing, in my opinion, on the one we are considering. There was no privilege in that case, and actual malice was not essential to the maintenance of the action. It was a very gross libel on a respectable married woman, published without any enquiry into its truth ; and one of the defendants, who were newspaper publishers, admitted that it was not their custom on receiving articles of news to ascertain their truth or falsity before publication ; and the question was as to the damages. The direction upon this point was, in my view, much too favourable to the defendants, and the jury very properly awarded substantial damages, as marking their sense of the reckless conduct of the defendants in dealing with the characters and reputations of individuals.

OSLER, J. A. :—

We must hold, following our decision in *Todd v. Dun, Wiman & Co.*, 15 A. R. 85, that the occasions on which the communications complained of were made were privileged occasions. Certain persons, with whom the plaintiff was about to deal, wished to know something of his business standing and character, and accordingly made enquiries

Judgment.

OSLER,  
J.A.

respecting him of the defendant, a person who carries on the business of acquiring, and, as it were, keeping in store and selling, such information to merchants and others respecting their customers. The information was not volunteered by the defendant, but given in reply to a specific enquiry. If true in any respect, however, it was only so in regard to another person of a partly similar name, while as regarded the plaintiff it was false in every particular.

In the *Todd* case, the information had been procured for the immediate occasion, and in order to enable the defendant to answer the special request, while here the matter communicated had already been furnished to the defendant and entered in his books for the purpose of being given to any one who should ask for it.

Whether persons employed by those who carry on a business of this kind can claim that their communications are privileged when not made for the special occasion, and to enable their employer to answer an enquiry which has already been made, may well be doubted. It is difficult to see how there can, in such case, be any interest, either to give or to receive the communication.

At present we are dealing only with the defendant and the publication by him of the information in his possession. How or when he procured it seems unimportant, except on the question of malice, unless indeed a person who makes a business of procuring and selling information as to the credit or character of a third party, is in a different position from one who merely answers gratis confidential enquiries, or enquiries made in the course of affairs for a reasonable purpose.

Such a distinction cannot, however, be maintained, because in both cases there is the right to make the confidential enquiries, and, therefore, the interest in receiving the answers, and on the other, the right or duty—though not a legal duty—to answer such enquiries. It would seem to make no difference that the information is paid for. In either case the occasion is privileged. As Grove, J., said, in *Robshaw v. Smith*, 38 L. T. N. S. 423:

"Every one owes it as a duty to his fellow men to state what he knows about a person, when enquiry is made; otherwise no one would be able to discern honest men from dishonest men." -

Judgment.

OSLER,  
J.A.

The decisions on this subject have been of late years very numerous. Opinions may differ as to what, under any given set of circumstances, is a privileged occasion, because, as Lindley, L. J., observes in *Stuart v. Bell*, [1891] 2 Q. B. 341, at p. 346 "the reason for holding any occasion privileged, is common convenience and welfare of society; and it is obvious that no definite line can be drawn so as to mark off with precision those occasions which are privileged, and separate them from those which are not." But the law is quite settled as to what is necessary to be proved in order to make the defendant liable once it has been ruled that the communication complained of was made on a privileged occasion. The following summary may be quoted from the judgment of Lindley, L. J., in the case just cited, omitting the well-known authorities he refers to (p. 345): "A privileged communication is one made on a privileged occasion, and fairly warranted by it, and not proved to have been made maliciously. A privileged occasion is one which is held in point of law to rebut the legal implication of malice which would otherwise be made from the utterance of untrue defamatory language. \* \* It is the duty of the judge to determine whether an occasion is privileged or not, and if it is, and there is no evidence of malice to go to the jury, it is his duty to enter judgment for the defendant. \* \* On the other hand, if the occasion is not privileged, or if there is any evidence of malice, then the case must be left to the jury. The law on this point has long been well settled, and was carefully explained in *Clark v. Molyneux*, 3 Q. B. D. 237." Then, dealing with the question of malice, the occasion being privileged, he goes on to say (p. 351): "If the occasion is privileged the plaintiff must prove malice in fact; the burden of proving this is on him: *Clark v. Molyneux*, 3 Q. B. D. 237. Malice, in



Judgment.

OSLER,  
J.A.

fact, is not confined to personal spite and ill-will, but includes every unjustifiable intention to inflict injury on the person defamed, or in the words of Brett, L. J., every wrong feeling in a man's mind."

In *Royal Aquarium v. Parkinson*, [1892] 1 Q. B. 431, it was held that malice might be proved by shewing that from some indirect motive, such as anger or gross or unreasoning prejudice with regard to a particular subject matter, the defendant stated what he did not know to be true, reckless whether it was true or false. In *Clark v. Molyneux*, 3 Q. B. D. 237, the law was laid down in the same way; and see Pollock on Torts, 4th ed., p. 253; *Nevill v. Fine Art and General Ins. Co.*, [1897] A. C. 68; and *Hebditch v. MacIlwaine*, [1894] 2 Q. B. 54. The result of the authorities seems to be that where the occasion is admitted or held to be privileged, express proof of malice is necessary, which in this class of cases seems to mean nothing short of bad faith.

Having regard to these authorities, I am obliged to say that the defendant's case was not put to the jury as favourably as it ought to have been on the question of malice. They were told that the question was whether the defendant had taken proper care in getting the information which he supplied; whether he had taken proper pains to find out the facts before sending the circulars to the merchants, and so on. But unless the negligence or want of care in giving information is of that reckless and extreme character that it may be said to be evidence of bad faith—that it was given in such a manner or under such circumstances that it might be said that the defendant did not care whether the information was true or false—I think the jury could not properly infer the existence of malice destructive of the privilege.

The evidence seems to me to fall short of this. The defendant simply gave the information he had received from his traveller, and so far as we know in the terms in which that person sent it.

Want of care there undoubtedly was in not verifying the statements, more especially, if as was said at the trial, the same traveller had previously made a similar mistake.

Judgment.

OSLER,  
J.A.

The matter communicated by him, moreover, wears much of the appearance of loose gossip, which the defendant might reasonably have refrained from communicating until he had learned whether there was a substantial foundation for it. Still the communication was pertinent to the enquiry, and I do not see that there is any evidence on which the jury could have reasonably held that it was made in bad faith or maliciously. *Cossette v. Dun*, 18 S.C.R. 222, relied on by the plaintiff, is a case which, if it does not turn wholly on French law, may be supported on the ground that some of the statements complained of were so wholly irrelevant and improper that no privilege could attach to them, or that there was abundant evidence of actual malice in the sense that the statements were recklessly or wrongfully made.

I regret, I must say, to be unable to apply what, in the second clause of the head-note, is said to have been determined in that case, to this defendant in this Province. It seems in every way reasonable that those who make a living by supplying for reward information which may be true or false about their neighbours' affairs should be made to answer for defamatory statements negligently made and should not be permitted to absolve themselves merely by shewing absence of malice or wrong motive.

I am not entirely satisfied that there is not some evidence of publication of the libel by its transmission to the defendant's Montreal office, or its communication even to his clerks here. This, however, was not relied upon, or a point made of it at the trial, and therefore it would be unsafe to act upon it at this stage. The defendant must not, however, assume that there is any privilege which will protect him against such a publication: *Boxsius v. Goblet Frères*, [1894] 1 Q. B. 842.

**Judgment.** I think that the appeal must be allowed and the action dismissed, but without costs.  
**OSLER,**  
**J.A.**

**MACLENNAN, J. A. :—**

I agree.

*Appeal allowed.*

**R. S. C.**

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**BAIN V. ANDERSON.**

*Master and Servant—General Hiring.*

**Statement.** THIS was an appeal by the defendants from the judgment of **MEREDITH, C.J.**, reported 27 O. R. 369, and was argued before **BURTON, OSLER, and MACLENNAN, JJ.A.**, on the 21st of January, 1897.

*McCarthy, Q. C.*, and *S. H. Blake, Q. C.*, for the appellants.

*Gibbons, Q. C.*, for the respondent.

May 11th, 1897.—The appeal was allowed with costs, **OSLER, J. A.**, dissenting, the majority of the Court holding that, upon the evidence, there was no definite engagement of the plaintiff, but merely a temporary arrangement pending the reorganization of the business.

**R. S. C.**

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## BEATON V. SPRINGER.

*Fire—Negligence—Clearing Land.*

In the month of August, the defendant set out fire on his own land for the purpose of clearing it. This fire continued to burn till October, when, in consequence of a very high wind, sparks were carried to the plaintiff's land, and set fire to some ties and posts stored thereon :—

*Held*, that the question of the defendant's liability for negligence should be determined having regard to the circumstances existing in October, and not to those existing in August.

Judgment of STREET, J., reversed.

THIS was an appeal by the defendant from the judgment of STREET, J. Statement.

The action was brought to recover the value of some telegraph poles and cedar posts belonging to the plaintiff, which had, as was alleged, been destroyed by fire set out by the defendant for the purpose of clearing his land, and it was tried at Hamilton, on the 14th of May, 1896, before STREET, J., and a jury.

It was proved that the defendant had set out fire on his own land in August, 1895, that this fire was still burning in October, 1895, and that the poles and posts were burnt in that month, there being some evidence that the fire which destroyed them spread from the defendant's land. The defendant contended that the case should be treated as if the fire had first been set out in October, and that if at that date the fire was under proper control, he was not responsible. The learned Judge, however, told the jury that if the defendant had negligently set out the fire in August, he was liable, and a verdict was found in the plaintiff's favour for \$275.

The defendant appealed, and the appeal was argued before BURTON, OSLER, and MACLENNAN, JJ.A., on the 23rd of November, 1896.

Argument. *George Lynch-Staunton*, for the appellant.  
*J. W. Nesbitt*, Q. C., and *W. T. Evans*, for the respondent.

January 12th, 1897. BURTON, J. A. :—

It is not, I think, material to consider whether the defendant was or was not guilty of negligence when setting fire to the brush heaps in the course of clearing in August; it may or may not have been a proper and suitable occasion, but it does not, to my mind, aid us in this discussion, as, up to the 26th day of October, when the damage occurred, no injury had occurred to the plaintiff since the setting out of that fire, and it was not an actionable wrong of which the plaintiff had any right to complain.

It may be that if the fire which caused the damage had been kindled by the defendant in October, as a necessary part of the operation of clearing, the jury might have been satisfied that the occasion was a suitable one, the weather favourable, and that there was a reasonable probability of it so continuing, in which case he would have been free from liability, if he used ordinary care and diligence to keep it within the limits of his own land.

But it was assumed as a fact and so treated by the learned Judge that this particular fire was a legacy from the fire set out in August, which ignited the black muck in the swamp where it smouldered for weeks to the knowledge of the defendant before the injury occurred.

What then was the responsibility of the defendant under such circumstances?

There must, I think, be a great similarity between that responsibility and that which the defendant would have assumed, had he for his own amusement, or for some purpose other than that of clearing the land or other purpose of husbandry, chosen to use fire, or permit the use of fire, on his land; in all such cases he is liable for the consequences if it escapes and does injury to his neighbour. It

may perhaps be arguable that even so, the ordinary rule of law applies that when the law creates a duty and the party is disabled from performing it by *vis major* or the act of God, the law will excuse him.

Judgment.

BURTON,  
J. A.

The defendant desired to prove that that was the position of things in this case, and claims that the learned Judge should have confined the enquiry to what occurred in October, and that a gale sprang up unexpectedly and really caused the injury.

I think with great deference, that the learned Judge should have excluded from the enquiry any evidence as to the fire in August, and should have allowed the evidence tendered by the defendant as to what took place in October, and that there should be a new trial.

I observe that the defendant concedes that the fire from his premises caused the damage, merely for the purpose of this motion, and that question will be open upon a new trial.

OSLER, J. A. :—

I think the appeal must be allowed.

From the learned Judge's ruling on the motion for non-suit and from his charge to the jury, it is evident that he was of opinion that the question of the defendant's liability depended upon whether it was negligent on his part to set out the fire on his land in the month of August. The fire which caused the damage occurred on the 26th of October following. There seems no reason to doubt that fire had been burning on the defendant's land from the time when it was set out in August, until the 26th October, on which day, in consequence of a very high wind arising, it blazed up and sparks were carried therefrom to a considerable distance, it is said, nearly half a mile, and across an intervening highway to the plaintiff's land, and there caused the fire complained of.

The fire had in the first instance been set out, and had from thence until the 26th of October been kept burning, on

Judgment.

OSLER,  
J.A.

the defendant's land in the ordinary course of husbandry, viz., for the purpose of clearing up land, and it had always been carefully managed and kept under control, doing no injury to any one. Therefore, during all that time there had been no negligence on the defendant's part, for no one had been damaged. Negligence, it is said, is the absence of care, according to circumstances—something not absolute or intrinsic, but always relative to some circumstances of time, place, or person. Had the fire complained of occurred in August, the circumstances of time and place might well have made it difficult for the defendant to evade the charge of negligence, if the act of setting out fire, owing to the then state of the wind and weather, or other exceptional circumstances, was one which no reasonable or prudent man would have done. But an act which might have been negligent in August or September, would not necessarily be so in the end of October; and as there had been no actionable negligence arising out of the existence of the fire during the former months, it appears to me, with great respect to my learned brother, that the case ought to have been considered as to the existence of negligence at the latter time, having regard to the then surrounding circumstances or conditions; in short, as if the fire had been started by the defendant on the day on which the injury occurred. The question to my mind is, was it negligent for the defendant, having regard to such circumstances, then to have that fire on his land? No doubt the fact of his having set out the fire in August is an important one, but only with reference to the question whether the fire existing there on the 26th of October was the result or continuance of one which the defendant had set out, so that it could be said to have been a fire caused by him. That, I think, is its only significance. In no other respect can there be said to have been a connection between the original act and the plaintiff's damage, because the measure of the defendant's duty to his neighbour in respect of the fire, changed, it might be, even from day to day, and therefore there was no necessary causal connec-

tion for which he would be responsible, between the original act and the subsequent damage.

Judgment.  
OSLER,  
J. A.

MACLENNAN, J. A. :—

I agree with my brother Osler.

*Appeal allowed.*

R. S. C.

IN RE THE BRANTFORD ELECTRIC AND POWER COMPANY  
AND DRAPER.

*Landlord and Tenant—"Buildings and Erections."*

THIS was an appeal by the lessors from the judgment of a Divisional Court [MEREDITH, C. J., and ROSE, J.] reported 28 O. R. 40, and was argued before BURTON, C. J. O., OSLER, MACLENNAN, and MOSS, JJ. A., on the 17th of May, 1897.

Statement.

*Wilkes*, Q. C., for the appellants.

*Armour*, Q. C., and *E Sweet*, for the respondents.

At the conclusion of the argument the appeal was dismissed with costs.

R. S. C.



## CABRIQUE V. BEATY.

*Bills of Exchange and Promissory Notes—Alteration After Maturity—Discharge of Accommodation Maker—53 Vict. ch. 33, secs. 56, 58, 63 (D.)*

A promissory note made by two persons, one signing for the accommodation of the other, was, after maturity, signed by a third person :—

*Held*, on the evidence, that this third person signed as an additional maker and not as an endorser, and that there was, therefore, a material alteration of the note discharging the accommodation maker.

Judgment of *BOYD, C.*, 28 O. R. 175, reversed.

**Statement.** THIS was an appeal by the defendants James Beaty and John Albert Beaty from the judgment of *BOYD, C.*, reported 28 O. R. 175, where the facts are fully stated, and was argued before *BURTON, OSLER, and MACLENNAN, JJ. A.*, on the 23rd of March, 1897.

*A. J. Russell-Snow*, for the appellant James Beaty.

*E. W. Boyd*, for the appellant John Albert Beaty.

*J. W. Elliott*, for the respondent.

May 18th, 1897. *BURTON, C. J. O.* :—

This is a very embarrassing case owing to the manner in which the plaintiff has played fast and loose in his dealings with the note sued on.

It is of course quite clear that if after the note was a perfect instrument according to the intention of the parties as the joint and several promissory note of *W. C. Beaty* and *James Beaty*; the plaintiff caused it to be signed by *John Albert Beaty* as an additional maker, that would be such an alteration of it as would discharge *James Beaty*, as the addition of another party would materially alter the rights of the others to contribution, in case one of them was called upon and compelled to pay the whole.

The difficulty, in my mind, has been caused by the course taken by the plaintiff in declining at first to accept *John Albert Beaty's* signature as security in any form ; and my first impression was that the plaintiff having once elected

not to accept John Albert Beaty's additional name, was bound by that election, and could not afterwards change his mind and treat him as a maker without a fresh agreement with him, founded upon a good consideration; that the instrument, therefore, never became the note of John Albert Beaty; and it might become necessary, therefore, to consider how far that could be treated as an alteration so as to relieve James Beaty the surety.

The learned Judge below has, notwithstanding that the plaintiff has in his statement of claim treated John Albert Beaty as a joint and several maker, held that he was an endorser, and if so, no question of alteration would arise.

But I agree with my learned brothers, that there is nothing in the evidence or on the face of the note itself to warrant that conclusion. He was to become liable, if at all, as additional security, but he might become liable in that character, just as James Beaty had become liable as a joint and several maker.

I do not think section 56 of the Bills of Exchange Act [53 Vict. ch. 33 (D)], establishes any new law. It was, as stated by one of the Judges in *Ex parte Yates*, 2 DeG. & J. 191, settled for more than a century that it makes no difference where the signature is placed when the intention is proved.

In that case the intention was proved that Russell was to sign the note in the character of an endorser, and the note when produced shewed his signature not below the other makers, but in a different part of the note, although on its face. The statute says that where a person signs a bill otherwise than as a drawer or acceptor, or as applied to this case, a note otherwise than as a maker, he thereby incurs the liability of an endorser to a holder in due course. Here the defendant John Albert Beaty did not sign the note otherwise than as a maker, and he has been sued in that character.

The plaintiff having now chosen to sue him as a joint and several maker, I think we may assume in his favour that, notwithstanding his statements to W. C. Beaty, he

Judgment.

BURTON,  
C.J.O.

Judgment. never did seriously intend to refuse to take John Albert  
BURTON, Beaty as a party to the note.  
C.J.O.

It does not appear that he ever saw John Albert Beaty upon the subject, and he did not strike his name off the note; we do him no injustice, therefore, when we credit him with an intention throughout to accept him as additional security as a maker, but that involves the release of James Beaty for the reasons I have mentioned.

I think that the course taken by him placed him in great peril of losing his claim against John Albert Beaty also; but on the whole, I am of opinion that if the latter wished to be relieved, he should have applied to the plaintiff to have his name stricken from the note, and time having been in fact given, there was a sufficient consideration for his contract.

I am of opinion, therefore, that the judgment should be affirmed, except as to James Beaty, as to whom it should be allowed with costs and the action dismissed with costs.

OSLER, J. A.:—

I am constrained to hold, with great deference to the learned trial Judge, that the appeal of the defendant James Beaty should be allowed.

Two questions are raised by his defence: 1st, whether the defendant John Albert Beaty signed the note as maker, or is to be regarded simply as an endorser; and 2nd, if he signed as maker, whether that is a material alteration of the note which discharges the appellant, having been made after the note was issued by him and without his authority.

The effect of the 56th and 58th sections of the Bills of Exchange Act, 1890 [53 Vict. ch. 33 (D.)], is that where a person signs a note *otherwise than as maker or payee* he thereby incurs the liabilities of an endorser to a holder in due course and is subject to all the provisions of the Act respecting endorsers.

The note sued on was issued as the joint and several

promissory note of the defendants W. C. Beaty and James Beaty, the former being the principal debtor and the latter, to the knowledge of the plaintiff, his surety only.

Judgment.

OSLER,  
J.A.

It so remained down to some time in the month of June, 1894, when it was still in the plaintiff's hands, and about six months overdue. Then the defendant John Albert Beaty added his name thereto, immediately below the signatures of the other defendants, so that it became and is now to all appearance the joint and several promissory note of all three defendants. The defendant James Beaty had no notice of this and was not an assenting party to the addition of John Albert Beaty's name. The plaintiff contends that John Albert Beaty's position is simply that of an endorser, though in his pleadings he has charged him as a joint maker.

The evidence is that after the note became due and when the plaintiff was pressing W. C. Beaty for payment the latter wanted time, and "offered to put his son John Albert on the note as additional security."

W. C. Beaty swears that "he understood" the plaintiff assented to this, but the plaintiff denies it, saying that he told him he could not give him an extension of time, and must have the money, that it was his wife's and she was uneasy about its non-payment. He also said that when Beaty proposed to see his wife about it, he told him he need not do so, as the note was in his name, and she could not extend the time. Beaty and his son nevertheless went to the plaintiff's house, saw his wife, told her that John Albert Beaty had come down to sign the note, "and she brought it out, and he signed it."

There is no evidence that he intended to sign as endorser, nor is there anything on the face of this note to throw doubt upon or qualify the character in which it purports to be signed by him, which is that of maker. Under these circumstances it appears to me that there is no room for the application of the statute.

From the mere fact that the defendant John Albert Beaty was proposed to be put on the note and that he became a

Judgment.

OSLER,  
J.A.

party to it as surety, just as the defendant James Beaty is, it is not a necessary inference that he was intended to be made or to become a party to it as endorser. The proposal could be carried out just as well by his becoming a joint maker, and there is no evidence on the face of the note or otherwise that he signed it in any other capacity. That is the contract evidenced by the note. He has not signed it otherwise than as maker, and therefore it is not necessary to invoke the aid of the statute, and to say that he has incurred the liability of an endorser. Had the plaintiff sued John Albert Beaty alone, I do not see that it could have been argued for a moment that he was entitled as being an endorser to presentment and notice of dishonour. The contract he had offered and the plaintiff had accepted was a contract similar to that of James Beaty, that, namely, of a maker for the accommodation of, and as security for, W. C. Beaty.

The case is quite distinguishable from *Ex parte Yates*, 2 DeG. & J. 191, 27 L. J. B'k'cy. 9, referred to in the judgment below. There the note was signed by three makers, and some years after it was due another person placed his name on the face of the note, not with or following the other names, but at a distance therefrom and in the lower opposite corner. The Court said: "The question is as to the meaning and intention with which Richard Russell signed his name on the note, and it is, in my opinion, established by the evidence, that he signed the note in the character of an endorser for the purpose of endorsement only. It is true that his name is written on the face of the note, but it has been for more than a century settled that this makes no difference where the intention is such as it was here. It is clear, that a signature having the effect of endorsement, and according to a secondary sense of the term called an endorsement, may be written on the face of the note, and if written with the same intention and effect as if written on the back, will have the same effect."

In the case at bar, there is no evidence that the defen-

dant John Albert Beaty intended to sign in any other character than that in which he appears to have signed, namely as maker, nor was there any reason why even as surety he might not there sign the note in that character. The statute has its full operation as declaratory of the law in such cases as *Ex parte Yates*, 2 DeG. & J. 191; *Steele v. McKinlay*, 5 App. Cas. 754; *Ayr American Plough Co. v. Wallace*, 21 S. C. R. 256; *Wilkinson v. Unwin*, 7 Q. B. D. 636, where a person places his name upon a note under such circumstances that he is neither maker nor first endorser; and see *Robertson v. Hueback*, 15 C. P. 298; *Smith v. Richardson*, 16 C. P. 210; *Duthie v. Essery*, 22 A. R. 191; *Gwinnell v. Herbert*, 5 A. & E. 436.

Judgment.

OSLER,  
J.A.

What then was the effect of the addition to the note of the name of John Albert Beaty as maker under the circumstances I have mentioned? It may be conceded that the holder's assent to the act was at the moment wanting, if that makes any difference. The holder of the instrument may shew, and the onus is upon him to do so, that an alteration is not a material one, or that in truth it is not an alteration at all, as, *e. g.*, that it was made before the note was issued or is a mere accidental mark upon, or defacement of, the instrument of no greater significance than if it had been accidentally destroyed.

Alteration implies intention and here is something that was deliberately and intentionally done. That it was a material alteration, the effect of which is to discharge the other maker James Beaty, even though at the time not assented to by the plaintiff, is expressly decided in *Gardner v. Walsh*, 5 E. & B. 83, and in *Reid v. Humphrey*, in this Court, 6 A. R. 403, where the added name was held, though a forgery, to be a material alteration. I refer also to *Davidson v. Cooper*, 13 M. & W. 343, and *Burchfield v. Moore*, 3 E. & B. 683, where Lord Campbell says: "He (the holder) ought to suffer; for a party who has the custody of an instrument made for his benefit, is bound to preserve it in its original state, and Lord Denman, in delivering

Judgment.

OSLER,  
J.A.

the judgment of the Exchequer Court in *Davidson v. Cooper*, 13 M. & W. 343, intimates a strong opinion that *Pigot's Case*, 11 Rep. 26b, in which this principle is acted upon, has hitherto been, and still ought to be, upheld. The negotiability of bills of exchange is to be favoured; but with this view it is material that their purity should be preserved."

In *Suffell v. Bank of England*, 9 Q. B. D. 555, Jessel, M. R., says: "Whatever may be said of the first resolution in *Pigot's Case*, 11 Rep. 26b, no doubt has ever been raised as to the second resolution which is this: That when any deed is altered in a point material by the plaintiff himself, or by any stranger without the privity of the obligee, be it by interlineation, addition, rasing, or by drawing of a pen through a line or through the midst of any material word, the deed thereby becomes void. So that even if a single word which is material is erased it destroys the instrument. It was next decided (he goes on to say) that such rule of law which applied to deeds applied to documents not under seal. The case which decided this was the well known case of *Master v. Miller*, 1 Sm. L. C., 8th ed., p. 857."

*Aldous v. Cornwell*, L. R. 3 Q. B. 573, overrules so much of the second resolution in *Pigot's Case*, 11 Rep. 26b, as lays it down that an alteration by the obligee of a part not material destroys the instrument. In *Lowe v. Fox*, 12 App. Cas. 206, at p. 217 (not the case of a promissory note), Lord Herschell says, that he reserves his opinion upon the question whether a document is invalidated if the alteration be made against the will and in fraud of the person who has charge of it, and who has to rely upon it. It would be difficult, however, for the plaintiff to derive any aid from this suggestion even were it open for any Court short of the House of Lords to act upon it, inasmuch as he demanded payment of the sum from John Albert Beaty, and now sues him upon it, thus asserting the instrument in its altered form as strongly as possible.

The law as declared in the cases I have cited would appear to have been adopted by the Legislature in section

63 of the Bills of Exchange Act, which enacts that where a note is materially altered without the assent of all parties liable upon it, it is voided except as against a party who himself made, authorized or assented to the alteration, and subsequent endorser. The proviso to the section emphasizes the force of this enactment by protecting in some respects a holder in due course of a cheque, bill, or note which has been materially altered, unless such alteration is "apparent;" as to which see *Scholfield v. Londesborough*, [1896] A. C. 514, and *Leeds Bank v. Walker*, 11 Q. B. D. 84.

Judgment.

OSLER,  
J.A.

As regards John Albert Beaty's appeal, I think we ought not to interfere. His contention is that he signed the note on the understanding that time was to be given to his father until after harvest. Carrique denies that he did agree to extend the time, that is to say, that he made any binding agreement to do so. Nevertheless, although he did at once demand payment from W. C. Beaty, he forbore to press for it, and brought no action until May, 1895, so that Beaty got all the time he asked for and more. The defendant, therefore, got the consideration for which he signed the note, and according to *Crears v. Hunter*, 19 Q. B. D. 341, and *Miles v. New Zealand Alford Estate Co.*, 32 Ch. D. 266, 289, 291, that is sufficient. It cannot, however, be said that Carrique ever repudiated John Albert Beaty's signature. He did no doubt say to W. C. Beaty that it would not do; that he must have the money, and told him to go and borrow it, yet he did not strike it off the note or repudiate it to John Albert Beaty himself; and he afterwards demanded payment from him, and now sues him on the note. I think he was willing, with this additional security, as he supposed, to let the time run on, and yet wished to leave himself at liberty to press for payment at any time should he think it advisable to do so.

The result, therefore, is that the appeal of the defendant James Beaty must be allowed with costs, and that of the other defendant dismissed in the same way.



Judgment. **MACLENNAN, J. A. :—**

**MACLENNAN,**  
**J.A.**

One of two or more makers of a promissory note may be a surety for the other or others; and the fact of his being a surety is no evidence that he signed otherwise than as a maker. There is no evidence that John Albert Beaty did not sign as a maker, and he must, therefore, be liable as a maker or not at all. It is, however, said that there was no consideration for the making of the note by him, and it is a somewhat nice question of fact whether there was. He went to the plaintiff's house and asked the plaintiff's wife for the note and put his name to it, asking for an extension of time. The plaintiff was not then present, but when he afterwards met John Albert Beaty he told him it would not do, and that the note must be paid. No more was said. John Albert Beaty did not ask to have his name removed, and the plaintiff retained the note with his name upon it, and waited till after harvest, the extension of time which had been asked for. I think the leaving of his name on the note without objection or remonstrance may be regarded as a continuation and repetition of the request for time; and that the granting of that time by the plaintiff was a sufficient consideration for John Albert Beaty's signature.

In *Crears v. Hunter*, 19 Q. B. D. 341, Lord Esher, M. R., in the Court of Appeal, holds that a request for time followed by forbearance, without any actual binding agreement at the time, is a sufficient consideration.

I think this case is within that authority, and that John Albert Beaty's appeal fails.

As to James Beaty's appeal, that depends on the effect of a new party being added to the note without his knowledge and consent. Without John Albert Beaty's signature, the note was a joint and several note of W. C. Beaty and James Beaty. By the addition of John Albert Beaty's name, it became a joint and several obligation of three, and not merely of two, an alteration clearly material, and therefore sufficient to discharge James Beaty from all

liability : *Master v. Miller*, 1 Sm. L. C., 9th ed., p. 825 ; and *Judgment.*  
*Gardner v Walsh*, 5 E. & B. 83.

MACLENNAN,  
J.A.

I am, therefore, of opinion that James Beaty's appeal should be allowed, and that John Albert Beaty's appeal should be dismissed.

*Appeal allowed in part.*

R. S. C.

### MONTGOMERY V. CORBIT.

*Bankruptcy and Insolvency—Assignments and Preferences—Fraudulent Preference—Previous Agreement—Threatened Action for Tort.*

One of the defendants, when threatened with an action on behalf of the plaintiff to recover damages for slander, conveyed his farm to his co-defendant, his son, the alleged consideration being the son's agreement, entered into several years before, to maintain the grantor and his wife for life. The plaintiff brought the threatened action and obtained judgment for damages and costs and then attacked the deed, and in that action it was proved that such an agreement had in good faith been made :—

*Held*, that the previous agreement, although not proved with sufficient clearness to have enabled either party to it to enforce specific performance, was an answer to the charge of fraud.

Judgment of a Divisional Court reversed.

THIS was an appeal by the defendants from the judgment of a Divisional Court [ARMOUR, C. J., and FALCONBRIDGE and STREET, JJ.]. Statement.

The plaintiff on the 13th of February, 1894, brought an action against the defendant Samuel Corbit to recover damages for alleged slander, and on the 10th of November, 1894, obtained judgment for one dollar damages and costs, which were afterwards taxed at \$393.68. Notice of her intention to bring the action had been given by the plaintiff's solicitors to the defendant Samuel Corbit some days before the issue of the writ.

On the 13th of November, 1894, the plaintiff brought this action asking to have set aside as fraudulent and void a conveyance of certain land, made on the 14th of Feb-

**Statement.** ruary, 1894, by the defendant Samuel Corbit to his son, the defendant William Corbit.

This conveyance contained recitals that it had been arranged and agreed by and between the parties thereto, a number of years ago, that the lands in question should be conveyed to the defendant William Corbit in consideration of maintaining and supporting the defendant Samuel Corbit and his wife during their natural life; that that arrangement had been acted upon ever since; that the defendant William Corbit had worked the lands and had maintained and supported the defendant Samuel Corbit and his said wife; and that the defendant William Corbit had requested his co-defendant Samuel Corbit to carry out the agreement by conveying the lands to him.

The conveyance was made subject to a mortgage, and contained a covenant by the defendant William Corbit, with the defendant Samuel Corbit and his wife, that he would maintain and support them and the survivor of them, during their natural lives, and the natural life of the survivor in a proper and suitable manner. Samuel Corbit had at this time no other property.

The action was tried at Orangeville on the 21st of March, 1895, before BOYD, C., who, at the close of the case, gave the following judgment:

BOYD, C.:—

This transaction comes very near the line where it could not stand; but although the matter is open to question on many points which Mr. Myers has urged, I think upon the whole that the deed will have to stand; and I will not give any costs, though I dismiss the action, because I think the conduct of the defendants invited this investigation. They wait till the last moment, when the action is commenced which results in the judgment for costs which is now the subject of the plaintiff's claim; they wait till then before the conveyance is obtained.

I am familiar with the cases cited, and the principle which controls the Court' in this branch of law is whether or not the motive which influenced the making of the deed is an honest and legitimate motive, or whether the transaction was a fraudulent one, with a view to protect from creditors.

Judgment.

BORD, C.

Now, unless I can reject the evidence of these four people who have spoken—and they have interest, no doubt, the father and the son, the father's wife and the son's wife, they are interested no doubt, and therefore their evidence has to be taken with reference to that—yet, unless I am to say they have concocted this whole story, I am obliged to accept the conclusion that there was an arrangement made in April, 1889, the nature of which is set forth in this subsequent deed, and the substance of which was that the old man being taken ill at that time, and finding himself unable to work the remaining forty acres which he had, arranged with the son that the son should do the work, have the place when he wished to ask for it, on condition that the wife and himself would have a comfortable maintenance.

The answers which Mrs. Margaret Corbit, the young woman, the wife of the son, made, I think satisfy one that this support has been given. She struck me as telling the truth, and she says that for six years the support has been given. She gave some items in which groceries and other things had been given to the old people, which was carrying out this agreement to keep them.

There is a good deal of evidence for and against the ostensible way of working the place; but there is a large body of evidence to shew that the place has, as a whole, been worked by the son since 1889, that he is the one who does the business, that he sells the grain. There has been no refutation of that, although witnesses have been brought up on the question of the cattle, selling grain, keeping the money and paying the taxes. One, William Dunning, does say that some hogs and pigs and sheep were sold on one occasion, and he paid Samuel. That is the

Judgment.  
BORD, C.

only instance in which the stock was dealt with that apparently belonged to the son. The other witness, Gillespie, who bought the bull, is not in derogation of that transaction, because that was the property of the wife, as she tells us.

Now, I am not informed of the value of these forty acres; I do not know, I am sure, what proportion it bears to the amount of burden that is on it. It is said to be encumbered, either it or the whole ninety acres, to be encumbered by a mortgage of \$1,800. I understood it had a mortgage of \$1,800 at that time, and that that has been spread over the whole; but, however that may be, there was a mortgage on it at the time of this transaction.

I do not think that upon the evidence, which is all one way, so far as the agreement is concerned, that I can say that was an afterthought; these four people speak of it, depose to it, and there was an explanation thrown out by the son as to why it was not carried out at the time, which may be a correct one, that the father wanted to have a vote. Not much weight can be attached to the assessment from year to year, because that was the assessment in accordance with the legal estate. The legal title was in the father of the one piece, and in the son of the other; and the assessment merely shews that which was the actual fact, so far as the legal estate was concerned.

The son tells us he paid the taxes all these years; there is no contradiction of that. Then it is not an evidence of fraud that the grantor, the father, was in possession, because that is a part of the bargain, that he was to occupy the house and have his living. It was near by and convenient, and there is nothing extraordinary in that stipulation, nor in the way in which it was carried out; and I think the real test in these cases, is not the doctrine of specific performance, as to whether or not there could be, *in invitum*, against unwilling parties, specific performance, but the test is this: the measure of right which the execution creditor has against the property which he

seeks to lay hold of. If there is a prior equity, or a predominating equity, on the part of the son as to this land, then the execution creditor should not be able to take more than the father could properly give; and if the father had made this arrangement with the son to let him have this place and let him work it and be the master of it, and own it, on condition that he was to keep him, and if the son since then has gone on and worked the place and kept the father, then it would be an inequitable thing to take this from the son and give it to the execution creditor. So I think, according to the legal test applicable to this case, it comes within the definition of being a *bond fide* transaction which ought to inure to the benefit of the son.

Judgment.

BOYD, C.

I have covered all the points, I think, which need to be dealt with; and, although Mr. Myers has forcibly argued the case, and although I cannot say the case is free from doubt, I think the better conclusion is to dismiss the action, but I will dismiss it without costs.

On motion to a Divisional Court, this judgment was reversed, the judgment of that Court being delivered on the 22nd of November, 1895, as follows:

ARMOUR, C. J. :—

I am unable to agree with the inferences of fact drawn by the learned Chancellor from the evidence in this case, and being unable to agree with them, it is my duty to draw the inferences of fact that in my judgment ought to be drawn from the evidence: *Jones v. Hough*, 5 Exch. D. 115; *The Glannibanta*, 1 P. D. 283; *Read v. Anderson*, 13 Q. B. D. 779; *In re Randolph*, 1 A. R. 315.

In most cases where a conveyance has been made with intent to defeat creditors, some pre-existing contract or part consideration is set up in support of the good faith of the conveyance, and in all such cases it is the duty of the Court to scrutinize the evidence of such pre-existing con-

**Judgment.** tract or part consideration with jealous suspicion, and the  
**ARMOUR,** present is such a case.  
**C.J.**

The alleged pre-existing contract was said to have been made about the 1st of April, 1889.

It was never carried out by a conveyance till the 14th of February, 1894, nearly five years after it was alleged to have been made, and the day after suit had been brought, to the knowledge of both parties, by the plaintiff against the grantor in the conveyance.

No reasonable excuse was given for its not being carried out during all that interval, and no application appeared to have been made during all that time by either party to the other to have it carried out.

It is neither reasonable nor probable, if such a contract had been made, that the son, to whose advantage it was, would have taken no steps, and would have made no application to have it carried out by his father, and would have run the risk of its never being carried out, either by the change of mind or by the death of his father.

On the 22nd of March, 1889, only ten days before the alleged contract is said to have been made, the father, in consideration of natural love and affection, conveyed to this son, fifty acres adjoining the land in question in this suit which, together with the land in question, formed one farm, subject to a mortgage of \$1,800 upon the whole farm, which the son agreed to pay off, and it is but reasonable to infer that if the alleged contract had been made it would have been carried out at once, or at all events within some reasonable time, for it is obvious that both parties were aware of the necessity of having such a contract carried out by a conveyance.

Conceding that about the 1st of April, 1889, some talk did take place between the father and son in reference to the subject matter of the alleged contract, I do not think that it can fairly be inferred that such talk resulted in a contract; nor do I think it can be inferred that any contract was made until the making of the impeached deed.

And a comparison of the loose talk deposed to as having

taken place at that time with the specific and definite contract recited in the impeached conveyance confirms this view.

Judgment.

ARMOUR,  
C.J.

This view is also confirmed by the fact that at that time a daughter was living with the father, and it is apparent, from the evidence of the mother, that the talk that took place included the support of this daughter.

There was no real difference in the conduct of the parties after the alleged contract as to the business of the farm than in their conduct before it.

Nor was there any difference between their conduct after the alleged contract, and what would naturally be the conduct of a father and son as to the business of a farm—the father being the owner of it, and the son working it without any such contract as was alleged.

The father continued to work on the farm as much as he was able, and for three or four years prior to the trial was selling hogs, sheep and lambs off the farm to a dealer named Denning, and receiving payment for them, a fact which was neither denied nor explained.

The insurance of the property on the land in question being continued in the father's name, and the manner in which the land in question was assessed, were not without their significance.

Having regard to all the facts in evidence in this case, I can draw no other conclusion from them than that, whatever talk there may have been, there never was any contract between the parties until the making of the impeached conveyance, and that any contract between them must be treated as having been made at that time: *Penhall v. Elwin*, 1 Sm. & G. 258; *Goldsmith v. Russell*, 5 D. M. & G. 547; *In re Maddever, Three Towns Banking Co. v. Maddever*, 27 Ch. D. 523.

Treating it as having been made at that time, the impeached conveyance must be held to be fraudulent and void as against the plaintiff, and would have been so held by the learned Chancellor.

For it is quite clear that the father was by it divesting



Judgment. himself of all his property, and that the motive for his  
ARMOUR, doing so, in the minds of both father and son, was to  
C.J. defeat the plaintiff's claim.

The mother was a necessary party to the suit, and ought to have been made a party to it originally, and the judgment must save her rights.

Judgment will, therefore, be for the plaintiff with costs, saving the rights of Elizabeth Corbit, under the impeached conveyance.

STREET, J. :—

As I understand the judgment of the Chancellor, he has found upon the evidence that a parol contract was made between the father and son in 1889, to the effect that thenceforward the forty acres in question should belong to the son in consideration of his agreeing to support his parents, and permitting them to live in the dwelling house upon the property during their lives ; and that the father should convey the property to his son whenever a conveyance should be asked for.

No change of possession seems to have taken place, and the son, with the assistance of the father, worked both places much as they had done before the contract ; but the son carried out his bargain by taking the proceeds of the forty acres as well as of the fifty acres, and by furnishing the support for his parents.

It is not shewn whether the son has been a gainer or a loser by receiving the profits and supporting his parents during the five or six years which passed before the conveyance was made.

The Chancellor in his judgment thus states the principle upon which the case should be determined : " I think the real test in these cases, is not the doctrine of specific performance, as to whether or not there could be, *in invitum*, against unwilling parties, specific performance, but the test is this : the measure of right which the execution creditor has against the property which he seeks to lay

hold of. If there is a prior equity, or a predominating equity, on the part of the son as to this land, then the execution creditor should not be able to take more than the father could properly give; and if the father had made this arrangement with the son to let him have this place and let him work it, and be master of it, and own it, on condition that he was to keep him, and if the son since then has gone on and worked the place and kept the father, then it would be an inequitable thing to take this from the son and give it to the execution creditor. So I think, according to the legal test applicable to this case, it comes within the definition of being a *bond fide* transaction which ought to inure to the benefit of the son.”

Judgment.

STREET, J.

The only finding, therefore, is upon the *bond fides* of the parol agreement, which the Chancellor finds to have been made between the parties in 1889. The question of the intent with which the impeached conveyance of February, 1894, was made, is not dealt with, unless the decision arrived at in favour of the defendants necessarily negatives the conclusion that the conveyance was made with intent to defeat creditors.

Under these circumstances, while I should have a great deal of hesitation in coming to the conclusion that the Chancellor's finding upon the question of fact, viz., the existence of a parol agreement made in 1889, should be reversed, I think it is quite open to us, and that we are in fact bound, to determine what is the proper inference to be drawn from those findings upon the charge of the intent to defeat creditors.

The contract between the father and son appears from their evidence, to which the Chancellor gave credit, to have been one of those loose verbal agreements between an aging farmer and his grown-up son, of which many instances are to be found in our reports, under which the son remains with his father and works his land for him upon a promise that he shall have the ownership of it at a future time.

The Courts have found it impossible upon any safe

Judgment.  
STREET, J.

principle to award specific performance of such arrangements, and the Chancellor speaks in his judgment here as if no question of specific performance could arise. The agreement was in fact wholly a verbal one, and there were no acts of part performance to take it out of the Statute of Frauds.

Being then an agreement of which specific performance could not have been enforced by the son, and there being no proof of the passing of any valuable consideration from the son to his father (for the profits of the farm may not be presumed to have been less than the cost of the maintenance of the parents), the conveyance must, in my opinion, be treated to have been voluntary, that is, without valuable consideration, on the part of the father: *Spurgeon v. Collier*, Eden at p. 61; *Warden v. Jones*, 2 DeG. & J. 76; *Penhall v. Elwin*, 1 Sm. & G. 258, 268; *Trowell v. Shenton*, 8 Ch. D. 318, 323, 324; May on Fraudulent Conveyances, Bl. ed., p. 245.

Several of the cases referred to are cases in which post-nuptial settlements founded upon parol ante-nuptial agreements have been attacked, but they seem very applicable to the present case, because the decisions are based upon the section of the Statute of Frauds which requires both contracts for the sale of lands and contracts upon the consideration of marriage, to be in writing.

In *Spurgeon v. Collier*, Eden at p. 61, Lord Chancellor Northington, speaking of the parol ante-nuptial promise there relied upon, says that if such a contract had been proved, "it would not better the case. It is admitted that since the statute (of Frauds) though such promise was made, Dr. Alston (to whom it was said to have been made), could have no remedy. Then the settlement was voluntary, for it could not be compelled. It was made to a person having no right to demand it; for where there is no remedy, there is no right. But if such a parol agreement were to be allowed to give effect to a subsequent settlement, it would be the most dangerous breach of the statute, and a violent blow to credit. For any man, on the marriage of a relation,

might make such promise, of which an execution never could be compelled against the promisor, and the moment his circumstances failed, he would execute a settlement pursuant to his promise, and defraud all his creditors."

Judgment.

STREET, J.

This language is quoted with approval and the principle laid down is followed by Lord Cranworth in *Warden v. Jones*, 2 DeG. & J. 76, and that case is followed by the Court of Appeal in *Trowell v. Shenton*, 8 Ch. D. 318.

I think these cases point out the danger of allowing effect as against creditors to be given to an agreement such as has been found to exist here. It would afford one other method, in addition to the many already available, of keeping property beyond the reach of the creditors of the owner, by enabling him to carry out a parol contract, if they became troublesome, while he could always fall back upon the Statute of Frauds as a defence to the parol contract. If it had been shewn here that the son had paid any money upon the contract with his father, or that any really valuable consideration had passed, there would, to that extent at all events, have been something upon which the conveyance could have been supported. Here no valuable consideration is alleged in the statement of defence to have passed, and, as I have stated, no attempt was made at the trial to shew that the cost of the keep of the father and mother had exceeded the profits of the farm. I think, therefore, that the conveyance must be treated as a voluntary one, made by the father to the son at its date; and as it withdrew from the reach of the creditors of the father his only means of paying the plaintiff's debt, for which, to the knowledge of the son, the father was being pressed at the time, the inference must be, notwithstanding the prior parol agreement, that it was made with intent to defeat creditors. It should be set aside as against the plaintiff, reserving, however, the rights of the mother, Elizabeth Corbit, who is not a party to the action, and the defendants should be ordered to pay the costs of the action and of the motion before us.

Judgment. **FALCONBRIDGE, J. :—**

**Falconbridge,  
J.**

I agree.

The defendants appealed and the appeal was argued before HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ. A., on the 25th of September, 1896.

*Aylesworth, Q.C., and W. L. Walsh, for the appellants.  
E. Myers, Q.C., for the respondent.*

November 10th, 1896. The judgment of the Court was delivered by

**HAGARTY, C. J. O. :—**

A full consideration of the evidence leads me to the conclusion that the learned Chancellor was right in holding that five years before the making of the impeached conveyance there had been an honest agreement made between the father and the son as to the conveyance of the forty acres, and the consideration then settled therefor.

The son was to get the deed whenever he required it, and to provide his parents with proper maintenance, and to assume the existing mortgage.

I think there was evidence of performance by the son of his verbal undertaking, and that the learned Chancellor properly so held.

The Chancellor discusses the evidence on each side, and expresses his conclusion of fact as to where the truth lay, and that the defendants' version of the whole dealing is reasonably proved.

There was no evidence whatever of the father having any creditors when the verbal arrangement was made, nor at the time he made the conveyance in fulfilment thereof, nor until some nine months after, when the plaintiff recovered a judgment in the slander action.

The whole case seems based upon the idea that there was a design or intent to defeat creditors.

The plaintiff never had a creditor's right or position when it is alleged that this deed was fraudulently made.

Her claim was wholly one for damages for alleged defamation—a claim, as we all know, of most doubtful character, and with a result uncertain, till determined by judgment.

As to the intent—the evidence is that the son hearing of some threatened proceedings by the plaintiff, determines to get his deed to which he was entitled on demand. He goes to the father alleging this reason, and the father swears he gave it to him because he asked for it.

There seems to have been no attempt made to prove any existing fraudulent intent on the father's part, nor is he asked anything thereon.

We are asked to infer the fraud from the circumstances. One of my learned brothers in reversing the learned trial Judge's decision, says: "I think, therefore, the conveyance must be treated as a voluntary one, made by the father to the son at its date; and as it withdrew from the reach of the creditors of the father the only means of paying the plaintiff's debt, for which, to the knowledge of the son, the father was being pressed at the time, the inference must be notwithstanding the prior parol agreement, that it was made with intent to defeat creditors."

I am unable to agree with this deduction from the evidence.

As already noticed, there was no creditor in existence, and nothing but a most uncertain possibility that at some future time a creditor might arise.

The plaintiff's damages finally amounted to one dollar.

We must regret to find that she incurred legal expenses amounting to three or four hundred dollars.

We have had to discuss of late the class of cases in which the law is declared, when a person about to engage in business which may or may not be of a hazardous or speculative character, makes a voluntary conveyance.

Judgment.

HAGARTY,  
C.J.O.

Judgment.

This case has no resemblance to those.

HAGARTY,  
C.J.O.

We are brought face to face with the question, whether a man with no creditors whatever, or debts accruing due, happens to have a dispute with another about the position of a fence said to obtrude on a neighbour's field, or a claim for damages done by some trespassing animal, and for which a person threatens to bring an action, is thereby debarred from executing a deed under an honest arrangement made five years before, and on which his vendee has honestly performed his part in furnishing maintenance.

I cannot agree that fraudulent intent can be treated as a fair inference when no proof is given of the existence of such an intent.

The Chancellor has admitted the difficulty of enforcing specific performance of such a verbal agreement. But he thinks that its proved existence and its being acted on for several years, is very strong evidence against the inference of such an intent. If no such arrangement had existed, and the father had made the conveyance merely because the plaintiff had threatened proceedings for damages, she would have had a far stronger case than the present.

I think the often cited decision *Ex parte Mercer*, 17 Q. B. D. 290, is strongly in the defendants' favour.

A voluntary settlement was upheld, made by a man aware that an action for breach of promise of marriage was pending against him. He had no creditors, and the Court below and the Court of Appeal refused to draw the inference of a fraudulent intent.

Cave, J., says (p. 294) : " It must be remembered that the settlor had no creditor whatever at the time when the settlement was made. He had no debt. There was merely a liability which might or might not result in a debt. I do not think that the decisions have ever been held to apply where there is nothing more than a liability of this nature."

I especially refer to Lord Esher's remarks in discussing the question of intent.

I think the case is most strongly in favour of the judgment of the trial Judge.

It is certainly wholly against my idea of justice, that such a possible cause of action as the plaintiff had can be held to defeat an agreement, or conveyance in pursuance thereof.

I accept the Chancellor's findings of fact, and I am unable to agree with the reversal of his judgment.

*Appeal allowed.*

R. S. C.

Judgment.

HAGARTY,  
C.J.O.

### BEATY V. GREGORY.

*Church — Trustees — Mortgage—Covenant—Personal Liability—R. S. O. ch. 237.*

The duly appointed trustees of a religious congregation, to whom by that description the site for a church has been conveyed, and who by that description give to the vendor to secure part of the purchase money a mortgage with the ordinary covenant for payment, are a corporation and are not personally liable upon the mortgage although it is signed and sealed by them individually.

Judgment of FALCONBRIDGE, J., 28 O. R. 60, affirmed.

THIS was an appeal by the plaintiff from the judgment of FALCONBRIDGE, J., reported 28 O. R. 60, where the facts are stated, and was argued before BURTON, OSLER, and MACLENNAN, JJ.A., on the 26th and 27th of January, 1897. The line of argument and the authorities relied on are stated in the report below.

Statement.

*Clarke, Q. C., and C. Swabey, for the appellant.*

*Moss, Q. C., and D. Urquhart, for the respondents.*

May 11th, 1897. BURTON, C. J. O.:—

Unless the defendants can be shewn to be an incorporated body under the Act respecting the Property of Religious Institutions, it seems to me there is no escaping from the conclusion that the covenant sued on is a personal covenant upon which they are individually liable; and



Judgment.

BURTON,  
C.J.O.

that no parol evidence, in the absence of fraud, is receivable to shew the contrary.

It is, as we know, a matter of every day occurrence for parties to decline making loans to churches except upon the personal security of some of its members, in addition to the church property; and the addition of the word "trustee" does not make it the less a personal covenant, for the obvious reason that, beyond the giving of the mortgage, the trustee has no power to bind the church assets, if any there be.

It is in such a case a word of description, shewing the capacity in which the covenantor acted.

I may say that I entertain no doubt in my own mind that the attempt to make these trustees personally liable was an after thought, as is manifest from the way in which the action was launched, the part that the plaintiff took in securing the property for the congregation, and the agreement before there was any appointment of trustees to take a mortgage for his security, and not a word said about the personal security of any one; but here is a covenant which, if the defendants were not a corporate body, was a clear personal covenant; and I am not at liberty to look beyond it; and even if it had been followed by a proviso that nothing in the deed should extend to any personal liability, that proviso would have been void as repugnant to the covenant; the exception should have been in the covenant itself, or, if the defendants had been well advised, they would have declined to enter into such a covenant at all.

We are driven, therefore, to face the question as to whether these defendants were a corporation under the statute to which I have referred.

The legislation, I am free to admit, is of the crudest, and it is not surprising that it has led to much difference of opinion, and that in several cases the Court has evaded giving a decision, but has left the matter open: see *Humphreys v. Hunter*, 20 C. P. 456; *Coleman v. Moore*, 44 U.

C. R. 328 ; *Franklin Church Trustees v. Maguire*, 23 Gr. Judgment.  
102.

BURTON,  
C.J.O.

Had the matter been *res integra*, I should have thought that the statute meant precisely what it says, and that the persons nominated as trustees to take a conveyance of the land were invested with a continuous succession, and that the statutory power to supply vacancies no more indicated an intention to create a corporation than similar provisions in an ordinary trust deed would do.

A somewhat similar question arose under an Act appointing commissioners for the town of Peterborough (*Peterborough Town Commissioners v. Cochrane*, 13 C. P. 111), and it was held by the Court of Common Pleas, the late Chief Justice Draper delivering the judgment, that they were not a corporation, but were, as their name implied, simply trustees.

I held in another case at *Nisi Prius* (*McSherry v. Cobourg Town Commissioners*, 45 U. C. R. 240), under an Act almost *ipsissimis verbis* relating to the town of Cobourg, that the commissioners were not a corporation, but was overruled by the Queen's Bench, who in delivering judgment refer to some remarks of Chief Justice Strong, in *Standly v. Perry*, 3 S. C. R. 356, to shew that in his opinion the commissioners in these cases were corporations. It is true that remark was obiter and not necessary to the decision, and though the opinion of only one member of the Court is entitled to great weight.

I do not, of course, dispute the position that a body may be created a corporation by implication, when, being constituted by any legal means, it is found that the purpose intended cannot be carried into effect without attributing the corporate character to such body. *Conservators of the River Tone v. Ash*, 10 B. & C. 349, is the leading case upon the subject, but where that necessity does not exist it does not appear to me that because the Legislature for convenience has conferred some of the attributes incidental to all incorporations, that it is to be assumed that it intended to confer upon them all the powers and incidents of a cor-

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BURTON,  
C.J.O.

poration. It is in this view only that I refer to the fact that the Legislature has not used the usual formula in reference to a corporate seal, as being some indication that they intended nothing more than they have actually said when they named this body as trustees, not necessarily of course as conclusive. If it is clear that it was the intention to create a corporation, all the incidents of a corporation immediately attach.

The end which the Legislature had in view in granting relief to these religious bodies was, as I think, fully attained by the appointing of trustees with a perpetual succession, and giving to them the power to bring suits for the protection of the land conveyed to them, and no necessity existed for going beyond this. The statute passed in reference to the Methodist Church in Canada being *in pari materia*, may, I think, be referred to. That gives a form of a model deed, which shews, I think, very satisfactorily, that the mode adopted here of having the mortgage executed by the trustees individually, adding their description as trustees, was correct, whether they are or are not a corporation.

There remains to consider the objection as to the regularity of the appointments. The trustees appear to have been nominated and appointed at a regular meeting, and the description in the deed of this official character appears to me to be a sufficient compliance with the requirement of the statute. I think, therefore, that that objection fails.

I still retain the opinion that all that was intended was to make these persons trustees, and not to erect them into a corporation; but the weight of authority is apparently against that view; and as my brothers agree that they are a corporation, I will not dissent.

Assuming that view to be correct, there can be no pretence for holding these defendants individually liable upon the covenant, which would be the covenant of the mortgagors in their corporate capacity.

I agree, therefore, in affirming the judgment below, although for a different reason.

OSLER, J. A. :—

Judgment.

OSLER,  
J.A.

I also am of opinion that the appeal fails. I think the intention of the Legislature, not indeed very formally expressed, was that the trustees of these religious bodies should be a corporation and the course of decision in the Courts from a very early period has been in accordance with this view. Finding no change in legislative expression in the latest Act on the subject I think we should adhere to the construction placed on its predecessors and dismiss the appeal.

MACLENNAN, J. A. :—

This is an action upon the covenant for payment contained in a mortgage made by the trustees of the Parkdale Baptist church, upon their church property, to secure the payment of \$3,250, the purchase money of land purchased for the congregation from the plaintiff. The action is against the trustees individually, and seeks to make them personally liable for the mortgage debt. The contention of the plaintiff is that the covenant is the personal covenant of the individual trustees, while the defence is that under the statute R. S. O. ch. 237, the trustees are a corporation, and that the covenant is a corporate act, and not their personal act or deed. It is probable that it was not the intention of the parties that the covenant should be personal, but no case is made by the pleadings for the reformation of the deed, and the sole question for determination is, what is the effect of the deed, as we have it before us, upon its true construction. Falconbridge, J., has decided the question in favour of the defendants, and this appeal is from his judgment.

The mortgage is under the Short Forms Act, and is expressed to be made between the defendants, describing them severally by name and addition, "Trustees under Revised Statutes of Ontario, 1887, ch. 237, of the Parkdale Baptist church, hereinafter called the mortgagors, of

Judgment. the first part," and the plaintiff of the second part. Then  
MACLENNAN, follow the grant of the land to the plaintiff, and the usual  
J.A. proviso for redemption upon payment. The covenants for payment and for title are in the usual short form, and are expressed to be made by "the mortgagors," and the deed concludes with this addition: "With privilege to the mortgagors, their successors or assigns, to pay off the mortgage at any time without notice." The attestation clause witnesses that "the said parties hereto have hereto set their hands and seals"; and then follow the signatures of all the trustees, with an ordinary seal opposite to each name, without anything purporting to be a corporate seal.

The mortgage was not an ordinary business transaction. It appears that the plaintiff purchased the land for the express purpose of conveying it to the trustees for the site of a church; and in order to enable them to borrow money to build the church, he permitted them to make a prior mortgage on the land for £1000 sterling, and the mortgage in question is expressed to be subject to that prior mortgage. Having regard to the surrounding circumstances, if this mortgage is capable of being construed as a corporate act, I think we ought so to construe it.

By a deed bearing the same date as the mortgage, the mortgagee had conveyed the mortgage property to the mortgagors, and the grantees in that conveyance are described substantially in the same terms as the grantors in the mortgage. In both the individual names of the trustees are mentioned, and they are described as Trustees of the Parkdale Baptist church. In both the Act relating to the property of religious institutions, R. S. O. ch. 237, is expressly mentioned. In the deed, the land is granted to the parties of the third part, their successors and assigns, and the limitation in the habendum, is in the same terms, and it contains a provision for the appointment of successors as mentioned in section 1 of the Act. It is clear, therefore, that in this mortgage transaction it was the intention and meaning of both parties to do an act authorized by the

statute under which the trustees were appointed. For the purpose of construing the mortgage which they made, we are able to see that the defendants had been appointed by a religious congregation as trustees, to whom and their successors land requisite for a church should be conveyed, and that land had been conveyed to them and their successors for that purpose, by a deed in which the manner of appointing successors was specified. The first section of the Act declares that under such circumstances such trustees and their successors in perpetual succession, might, by the name expressed in the deed take, hold, and possess the land so conveyed to them. The question is, whether under those circumstances the trustees have become a corporate body. The preamble of the original Act, 9 Geo. IV. ch. 2, recites that "religious societies \* \* find difficulty in securing the title of land requisite for the site of a church \* \* for want of a corporate capacity to take and hold the same in perpetual succession;" and that "it is expedient to provide some safe and adequate relief in such cases."

Judgment.  
MACLENNAN,  
J.A.

I think it is evident from that recital and from the quality of perpetual succession given to the trustees by the enacting words that the intention of the Legislature was to constitute them a corporation. That is the view which was taken of the Act by the Judges of the Court of Queen's Bench in the first reported case which arose upon the Act: *Doe d. Galt Trustees v. Bain*, 3 U. C. R. 198. At p. 205, Macaulay, J., says: "In whatever manner trustees are to be appointed, it is I think clear, that to enable them to take and hold in a corporate capacity under the statute, they must be appointed in some form by the congregation; and that when they claim to exercise corporate rights in ejectment, they must as part of their title prove that they are such a corporation. Though appointed under a statute, they are not created by the statute so as to enable the Court to take judicial notice of their existence, as it can of many other corporations; and being only a private body, created through the con-

Judgment.  
MACLENNAN,  
J.A.

gregation, their appointments must be shewn, in ejectment, like the appointment of assignees of bankrupts, and other parties having a right conferred upon them in relation to private matters, by the observance of certain proceedings authorized by law." In that case the conveyance was to certain named persons "and others, the present trustees of the Presbyterian church in Galt," and it was admitted that there had never been any appointment of the trustees by the congregation, nor was there in the deed any specification of the manner in which successors should be appointed; and it was held by a majority of the Court that the trustees were not a corporation, but took the land in their natural capacity. It is evident, however, that if there had been such an appointment, and if the deed had provided for the manner of appointing successors, all the members of the Court would have held the trustees to be a corporate body, by virtue of the Act: See *per* Macaulay, J., at p. 207, and at p. 212, Jones, J., uses this language: "The grant was intended to convey the estate to the individuals named and others as trustees under the statute. If trustees had been appointed under the statute by the congregation of Galt, etc., they would have held this estate, whether all had been named or none, or if the names of some had been mistaken; because it would have sufficiently appeared that the grant was to the corporation. The difficulty is that there is in fact no corporation known by the name of the Trustees of the Presbyterian Congregation of the Church of Galt. After a good deal of discussion, and upon the best consideration of the case which I can give, the opinion I have formed, is that the grant is to Hugh Wallace, etc. (the named individuals), and void as to the other intended grantees not named. That those grantees named hold in trust for the same purposes that they would have held as a corporation, if they had been legally appointed trustees under the statute 9 Geo. IV. ch. 2, and the deed had in all respects been in conformity with the provisions of that Act."

That case has been followed by a number of others in

which the corporate character of trustees, so appointed, and with the mode of succession specified in the conveyance, has been recognized with more or less distinctness. I refer to *Humphreys v. Hunter*, 20 C. P. 456; *Ainleyville Trustees v. Grever*, 23 C. P. 533; *Berkeley Trustees v. Stevens*, 37 U. C. R. 9; *Franklin Church Trustees v. Maguire*, 23 Gr. 102; *Coleman v. Moore*, 44 U. C. R. 328; *Re Wansley and Brown*, 21 O. R. 34; *Brown v. Sweet*, 7 A. R. 725, at p. 740.

Judgment.  
 MACLENNAN,  
 J. A.

The attribute of perpetual or continuous, succession, accompanied by more or fewer of the powers and faculties of a natural person, seems to be the distinguishing feature of a corporation: 1 Kyd on Corporations, p. 13; Shelford on Mortmain, p. 22; Morawetz on Private Corporations, 2nd ed., sec. 1; Grant on Corporations, pp. 4, 5. By 22 Vict. ch. 72, sec. 1, certain lands belonging to the town of Cobourg, the harbour, wharves, piers, etc., were declared to be vested in five commissioners, to be held in fee simple upon certain trusts, and it was declared that such trustees should be called "The Commissioners of the Cobourg Town Trust." By section 7, five named persons were declared to be the commissioners, and it was held by the present Chief Justice of Canada, delivering the judgment of the Supreme Court, that these enactments made the trustees a corporation: *Standly v. Perry*, 3 S. C. R. 356. I therefore think, that by the appointment of the congregation, and the execution of the conveyance by the plaintiff to them, the property in question became vested in the defendants not in their natural capacity but as a corporation.

A question has, however, been made as to a corporate name. The statute speaks of "the name expressed in the deed." I think there is no difficulty on that point; I think, although it is not stated expressly, or with the distinctness one would expect, that the name of these trustees expressed in this deed is "The Trustees of the Parkdale Baptist Church." A name is merely a word or words or language used to designate a person or a thing,



Judgment. and to distinguish the person or thing from all others, and  
MACLENNAN, in my opinion there is no difficulty in finding in this conveyance a name for the trustees in their collective or corporate character. In *Doe d. Galt Trustees v. Bain*, 3 U. C. R. 198, above referred to, at p. 207, Macaulay, J., speaks of the case of a grant to A., B., C. and D., the president, directors and company, of the Bank of Upper Canada, as presenting no difficulty, although the latter, and not the former, were the real grantees, so here we can see that the collective name of the individual persons who are mentioned, is for the purpose for which the deed was made, The Trustees of the Parkdale Baptist Church. There are many cases which illustrate how little necessary it is in deeds and other instruments to use what may have been the exact and precise name of a corporation party thereto.

Being of opinion that this church property was vested by the purchase deed in the trustees therein named in a corporate capacity, I think there is no longer any difficulty in the way of the conclusion that the mortgage is a corporate act of the same body.

By section 8 of the Act, the trustees so appointed are authorized to mortgage the church property for the purpose of securing the purchase money.

The mortgage describes them in their collective capacity with more precision than the deed, as "Trustees under Revised Statutes of Ontario, 1887, ch. 237, of the Parkdale Baptist Church," that description following the mention of their individual names and additions as parties of the first part. They are said to be thereafter called the mortgagors, and when the covenant for payment is reached, it is "the said mortgagors" who enter into the covenant; and it is, therefore, the corporate body which does so, and not the individuals. The same thing is indicated by the concluding paragraph which reserves to "the mortgagors, their successors and assigns," the privilege of paying off the mortgage at any time without notice.

It was further contended that the execution and attesta-

tion of the mortgage made it the deed of the individual trustees, and not a corporate act or deed. I do not think so. I think it is either the deed of the corporation or it is no deed at all. But I think it is the deed of the corporation. The attestation clause says, that "the said parties hereto have hereunto set their hands and seals." That necessarily means the parties of the first and second part, as before expressed; one of which parties is the trustees as a corporation. The Act makes no provision for any common seal, and yet expressly authorizes the making of deeds both of sale and mortgage. Each trustee has signed his name, and opposite each name there is a seal; and I think the sense and meaning of it all is, that it is sealed by each of them as a corporate and not a personal act. A single seal would have answered the purpose, and the signatures are of no more significance than is the signature of a president or other officer of a corporation, under similar circumstances, such as we are familiar with every day. I therefore think that this mortgage is a corporate act of the trustees, and not their individual covenant.

Judgment.  
MACLENNAN,  
J.A.

I think these conclusions are greatly favoured by the Act providing a model deed for the Methodist church of Canada, in taking conveyances of land under the general Act, which is similar to the deed in the present case; and also by the Act 52 Vict. ch. 54, sec. 1 (O.), which makes it sufficient for the future to use a collective name without setting out the names of the individual trustees.

I therefore think the judgment should be affirmed.

*Appeal dismissed.*

R. S. C.

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## WALKER V. ALLEN.

*Devolution of Estates Act—Children of Deceased Brother or Sister—R.S.O. ch. 108, sec. 6.*

Under section 6 of the Devolution of Estates Act, R. S. O. ch. 108, where brothers or sisters are entitled to share on an intestacy, the children of a deceased brother or sister of the intestate are entitled to share *per stirpes*.

*Re Colquhoun*, 26 O. R. 104, overruled.

Judgment of FERGUSON, J., reversed.

**Statement.** THIS was an appeal by the plaintiff from the judgment of FERGUSON, J.

The defendants were the executors of one Edward McCutcheon, an unmarried man, who died on the 8th of May, 1893. The plaintiff was one of the six children of Mary Walker, a sister of Edward McCutcheon, who had predeceased him. McCutcheon's father and five brothers and sisters survived him and his mother predeceased him. By his will he made a specific devise of certain real estate, which did not, however, take effect, and there was, in the events which happened, intestacy as to all his property. The plaintiff claimed that he and his brothers and sisters were entitled to a one-seventh share of the estate.

The action came on for hearing on motion for judgment on the 21st of March, 1896, before FERGUSON, J., who, following *Re Colquhoun*, 26 O. R. 104, dismissed it.

The plaintiff appealed, and the appeal was argued before BURTON, OSLER, and MACLENNAN, JJ.A., on the 22nd of January, 1897.

*R. A. Grant*, and *J. N. Fish*, for the appellant. This is in effect an appeal from the judgment in *Re Colquhoun*, 26 O. R. 104. That case, it is submitted, was wrongly decided. The plaintiff's right depends upon section 6 of the Devolution of Estates Act, R. S. O. ch. 108. Admittedly without that enactment, he would have no claim, but

the effect of that section is to bring in the rule of distribution provided by the Statute of Distributions, when brothers and sisters of the deceased are concerned, and in that event the children of a deceased brother or sister take the parent's share. The section does not profess to name the persons entitled, but simply cuts down the father's interest. From being the person solely entitled, he is made merely the equal of the mother or brother or sister, each of whom has always been obliged to share with the children of a deceased brother or sister. Argument.

*W. A. Bell*, for the respondents. The father's right before the Devolution of Estates Act was clear, and this ambiguous section cannot be construed as taking away that right. The section does not apply at all unless the mother survives. Even if it does, the right is limited to brothers and sisters. If it had been intended to let the children of a deceased brother and sister share, they would have been named.

*W. L. Walsh*, for the executors, submitted to the direction of the Court.

*J. N. Fish*, in reply.

May 11th, 1897. BURTON, C. J. O.:—

I have read the judgment prepared by my brother MacLennan, in which I entirely agree, and I can not usefully add anything to it.

OSLER, J. A. :—

I also agree in the conclusion arrived at by my brother MacLennan.

MACLENNAN, J. A. :—

The question turns altogether upon the proper construction of section 6. What it enacts is, that the intestate's father surviving shall not be entitled to any greater share

Judgment.  
MAOLENNAN,  
J.A.

under the intestacy than his mother or any brother or sister surviving. It does not repeal the Statutes of Distributions, but merely alters them. By the old law in such a case the father would take all, and the mother, brother or sister surviving, would take nothing. The Legislature now says the father shall take no greater share than the mother, brother or sister; that of course does not mean no greater share than the mother, brother or sister would take in such a case, for as in that case they take nothing, so the father's share would be nothing also: that would be an absurd construction to put upon the Act. In *Re Colquhoun*, 26 O. R. 104, the learned Chief Justice of the Common Pleas held that the clause was designed to enable the mother, brother and sister, if surviving, to share with the father, as if it had said that the mother, brother or sister surviving, shall share equally with the father. If that had been the language, I should be disposed to agree with him. But that is not the language. It is that the father is not to take any greater share than the mother, brother or sister surviving.

What I think, therefore, must be done in order to ascertain the share which the father is to take, is first to find out what share a mother, brother or sister surviving takes. When we refer to the old law, we find that the shares they took depended on circumstances. By the first section of the 22nd & 23rd Car. II. ch. 10, if there were children, the mother, brother or sister, took nothing, neither did the father. By section 7, if there were no children and no wife, the father took all; and if there was no wife or father, then by that section, as amended by 1 Jac. II. ch. 17, sec. 7, mother, brother and sister, took equal shares, including the children of deceased brothers or sisters, such children taking their parent's share among them. When, therefore, the question is asked what share a mother, brother or sister takes, within the meaning of this new enactment, I think the answer is the share which they take by law whenever they are entitled to any share at all; that is, the share which they would have taken in this case if

the father had not survived. In that case the mother and living brothers and sisters would each have taken one seventh, and Mary Walker's children would also have taken a seventh share among them. I think that construction best accords with the language which has been used. A literal interpretation is admittedly impossible, and we must find the meaning as best we can. Grammatically, the words "mother, brother or sister surviving," require a verb to be supplied, of which they are the subject. That verb evidently must be, "is entitled to," or "would be entitled to." Then, inasmuch as they are, or would be entitled to nothing, in the actual circumstances, the Legislature necessarily means what they would be entitled to in a case in which by law either of them would be entitled to a share.

Judgment.  
MACLENNAN,  
J.A.

The Statutes of Distributions supply that information, and, because in every case in which a mother, brother or sister surviving is entitled to a share under those Acts, the children of a dead brother or sister are also entitled so I think the father can take no more than a mother, brother or sister could take under those circumstances, and that leaves a share for the children of any brother or sister who may be dead. There is nothing given expressly by this section to mother, brother or sister. The gift is solely by implication, and I think the implication makes it necessary to hold that the children take a share when the father survives, just as they do when he does not.

No reason can, I think, be suggested why the children should be excluded in this particular case from the benefit which the statute confers upon their uncles, aunts and grandmother; and a construction which favours them is in harmony with what has been the policy of the law with regard to personalty since the reigns of Charles II. and James II., and with regard to realty in this Province since the abolition of the law of promogeniture, on the 1st of January, 1852, down to the year 1886, when the Act in question was passed: see section 38.

It is to be observed, too, that the words used, are "his mother or any brother or sister surviving." I do not

Judgment. think the use of the word "surviving" is of any assistance  
MACLENNAN, or force in elucidating the meaning of the Legislature;  
J.A. neither of them could take anything unless surviving. Then, although brother or sister is expressed in the singular, no one would say that the father's share must in every case be what it would be if he and the mother alone, or if he and one brother or one sister only, survived. It must, at least, mean that if the mother and several brothers and sisters survive, they are all to have shares, and to share equally among themselves and with the father. If that is so, and if the case of there being more than one brother or sister is within the section, although not expressly provided for, the same reason leads to the conclusion that the children of a deceased brother or sister are also within it.

The argument may also be presented in another form, to which I think there can be no answer. The old Acts and this section taken together make provision for the whole subject of the succession of intestates' estates and their distribution. Save as altered by this section the old Acts are still in force. Under the old Acts, father, mother, brothers and sisters, under certain circumstances took shares, and under other circumstances they took nothing. The new Act says the father shall take no more than mother, brother or sister. The old Acts said, and say still, that a mother, brother or sister, shall take no more than the children of a deceased brother or sister; and it follows as the result of the old and new legislation taken together, that the father can take no more than the children of a deceased brother or sister.

In my opinion, therefore, with great respect, the appeal should be allowed, and the plaintiff should be declared entitled to a share of the estate, that is, one-sixth of a seventh share.

*Appeal allowed.*

R. S. C.

## O'NEIL V. WINDHAM.

*Municipal Corporations—Highways—Negligence—Nuisance.*

A municipal corporation is not responsible for damages resulting from a horse taking fright at railway ties piled, without the authority of the corporation, on the untravelled portion of a highway, but the person piling the ties on the highway is responsible.

*Marwell v. Clarke*, 4 A. R. 460, followed.

*Castor v. Uxbridge*, 39 U. C. R. 125, considered.

Judgment of MEREDITH, J., reversed in part.

THIS was an appeal by the defendants from the judgment of MEREDITH, J. Statement.

The action was brought against the townships of Windham and Townsend, to recover damages sustained by the plaintiff by reason of a horse taking fright at some railway ties piled on the untravelled portion of a highway, within the joint jurisdiction of the two townships, the allegation in the statement of claim being that the townships "permitted a large number of railroad ties to be placed and piled upon the highway near to the travelled portion thereof so as to be calculated to frighten horses travelling on the highway, which, at the point in question, was very narrow with deep ditches at either side, which were not guarded by rails or otherwise, by reason whereof, as also by reason of the said ties so placed there, the highway was out of repair and dangerous."

The claim was afterwards amended by making the defendant Taylor a party, the allegation being that the ties were wrongfully placed by him at the place in question, and left there for a long time so as to be an obstruction.

The action was tried at Simcoe, on the 7th of December, 1896, before MEREDITH, J., when the following facts were proved:

A waggon of the defendant Taylor loaded with ties, while being driven along the highway in question on the 9th of January, 1896, broke down and the ties were removed from the waggon and piled on the untravelled



**Statement.** portion of the highway. On the 14th of January, 1896, the plaintiff's horse, while being driven past the ties, took fright and ran into the ditch and the plaintiff was injured. The pathmaster for the township of Windham admitted that he had on the 9th of January, 1896, seen a teamster unloading something upon the side of the road, but he was some distance away and did not know what was being unloaded and made no enquiries. The pathmaster for the township of Townsend saw the ties beside the road on the 9th of January, 1896, and two days afterwards notified the teamster of the defendant Taylor to remove them. Finding that the ties had not been removed, he notified the teamster a second time, and the teamster then told him that Taylor was the owner of the ties. The pathmaster afterwards saw Taylor, but in the meantime the accident had taken place. Other horses, besides that of the plaintiff, had shied when passing the ties.

The following judgment was delivered at the close of the trial in favour of the plaintiff:

**MEREDITH, J. :—**

The plaintiff sues in this action to recover damages which he says were caused by the negligence of the defendants. Now, there are three separate defendants to the action, two of whom are admittedly in the same position, the third is in quite a different position. In regard to the first two, the corporations, the plaintiff says that they are liable because they failed to perform the statute-imposed duty of keeping this public road in repair. The statute requires that these municipal corporations shall keep the public roads within the corporation limits in repair. That word "repair" is a somewhat elastic word. What will do in a new country, and what will do on a little travelled road, will not do in a well settled country, and on a much travelled road. A reasonable interpretation of that word must be given according to the facts of each particular case. Now, in this case, a load, or a part of a load, of ties

was, through necessity, one may say, deposited on the public highway, a thing which ought not to be done, which never should be permitted, if it can be avoided, because there must of necessity be more or less inconvenience and more or less danger arising from the placing of any kind of obstruction upon a public highway. If, as it has been fairly said in the plaintiffs' behalf, was the case here, it becomes necessary to place, or unload, upon a public highway, ties, cordwood, or any other load, or part of a load, it is the duty of those who place or unload it there to clear the highway as soon as possible, so as to avoid injury by reason of such use of it; and it is the duty of the corporations to which is committed the repair of the road to see to it that the obstruction is removed without any needless delay.

Judgment.

MEREDITH,  
J.

In this case the corporations had actual notice through the proper officer, the pathmaster, of the obstruction on the public highway. I cannot doubt that there was actual notice to the corporation through this officer of the obstruction, and a knowledge on his part that that obstruction must have been more or less of a dangerous nature. Then what is done? Going back a little, we have another pathmaster who knows there is some mischief on this part of the road, something going on there which ought not to have gone on, and yet he passes on, takes no trouble to enquire whether the road has been in any way put out of repair or obstructed, makes no enquiry, does not go to see for himself. The other pathmaster knows, sees for himself, and is informed by others of what has happened, and, to some extent, of the danger which has arisen from it. Now, is his conduct reasonable? I should say not. Instead of having it removed at once, he does not take any steps at all, but waits until he sees, not the man who is answerable for it, but that man's servant, and he then, in passing, tells him that the obstruction must be removed. Apparently he gets no satisfaction from the servant, and nothing more is done for a day or two, until he sees the servant again, when he is informed by him that he will do nothing, that

Judgment.

MEREDITH,  
J.

he is not obeying the pathmaster's orders, but that he is obeying his master's orders ; that, I understand by what the pathmaster says, is what took place between them. Some time after that the pathmaster goes to the master ; in the meantime the mischief is done. Now, I do not think that that was reasonable diligence on the part of the corporation in keeping this road in a proper state of repair. A different conclusion might possibly have been reached if there had not been actual notice. There was, then, the actual notice that the road was out of repair within the meaning of the statute, and a reasonable time elapsed for the doing of that which would have prevented this accident. I need not point out what this pathmaster ought to have done, but it is obvious that he might at a very little expense have had these ties removed from the travelled part of the road, throwing them, at least, away from that part of the road over which horses and waggons ordinarily passed. That was not done. I think that amounted, under all the circumstances of the case, to negligence on the part of the corporations, and therefore they are answerable for the injury which the plaintiff has sustained. It is admitted that if either is answerable they are jointly answerable for the whole damage.

As to the other defendant, I see no possible excuse for him. Even apart from any negligence in throwing the ties upon and so close to the travelled part of the road and otherwise so as to be an object likely to frighten horses passing along the road, it seems a case of gross negligence on his part. It ought to be understood by every one that public highways are not dumping grounds for the convenience of any man. Accidents cannot be helped, and a man is to be pitied when his load breaks down and he is obliged to encumber the public highway for a short time, but that time should be as short as possible. There is no excuse for leaving an obstruction on the highway until it suits a man's convenience to remove it. There is no excuse for his doing his daily labour with his team, earning money in some other field, while he purposely leaves this

duty which he owes to the public unperformed. That is what this defendant did; that is what he almost boasted of his having done; he would take away this obstruction, piece by piece on other loads when it suited his convenience. It seems to me a very clear case against him. The only way in which the plaintiff's action could be defeated, as far as he is concerned, would be by a finding that this was not an obstruction to the road, or not the cause of this accident. Now, it is very plain on the whole testimony that this was an obstruction in the road which was dangerous to persons driving over the road. I should have thought it was not necessary to call witnesses to establish that. There may be a hundred horses that will pass by a thing of this kind without any fear, and there may be fifty others that cannot pass it without being put in a great state of fear, exhibited generally by shying. One is not at all surprised at horses shying at an object of this character. It may be if this horse had seen it for a long time, or come upon it in a different way, he might not have been so much alarmed, but this object was there, and apparently he came upon it of a sudden, in the evening when the light was bad, and one can imagine it then being a very startling object to many horses. I have no doubt that it was an object calculated to cause accidents of this character.

Judgment.  
MEREDITH,  
J.

The only question causing doubt, in my mind, is the question of damages. The plaintiff, fortunately, has not sustained any very serious injury. No doubt he was badly shaken up, and suffered considerable pain, and he ought to be reasonably compensated for that. In regard to the loss of profits, the evidence is not as clear as it might be, and I cannot give the plaintiff all he thinks he ought to have in that respect.

I find in favour of the plaintiff against all the defendants, and assess the damages at \$250. Judgment will be entered for that amount, with costs of the action. There will be relief over, to the townships against the defendant Taylor. That which the statute provides for they may have.

Argument. The defendants appealed and the appeal was argued before BURTON, OSLER, and MACLENNAN, JJ. A., on the 26th of March, 1897.

*G. Lynch-Staunton*, for the appellant Taylor. The defendant Taylor was making a reasonable use of the highway and was not guilty of any negligence. The ties were not placed on the travelled portion of the road, and were not an obstruction, and they were not of such a nature as to be a nuisance: *Sydney v. Bourke*, [1895] A. C. 433. The plaintiff's remedy, if any, is against the townships.

*T. R. Slaght*, for the appellants the townships of Windham and Townsend. The ties in question were piled upon the highway without the knowledge or authority of the townships and were not allowed by the townships to remain for an unreasonable time upon the highway, and if the plaintiff can claim damages against any one it is only as against Taylor. The ties did not impede traffic and were not of a nature to frighten horses: *Rounds v. Stratford*, 26 C. P. 11; *Howden v. Lake Simcoe Ice Co.*, 21 A. R. 414; *Zumstein v. Shrumm*, 22 A. R. 263.

*T. Macbeth*, for the respondent. The defendant Taylor, wrongfully left the ties at a dangerous place and the townships with notice of the danger allowed the ties to remain there for several days, and all the defendants are liable: *Walton v. York*, 6 A. R. 181; *Howarth v. McGugan*, 23 O. R. 396; *Wilkins v. Day*, 12 Q. B. D. 110.

*G. Lynch-Staunton*, in reply.

May 11th, 1897. BURTON, C. J. O.:—

I have more than once expressed my regret that it had not been left to the Legislature to define the subjects for which the municipalities should be liable, if it was thought that that liability should be extended beyond what the words "keep in repair" in their natural and obvious meaning would seem to imply. The powers of the muni-

icipalities to deal with obstructions are provided for in a different section, and the construction placed upon the words "keep in repair" has always appeared to me to be a very strained and unnatural one. This, however, appears to me to be an attempt to extend the liability of the municipalities beyond anything yet decided, and it seems to me to fall within the decision in this Court in *Maxwell v. Clarke*, 4 A. R. 460; a judgment in which I concurred, although not agreeing in some of the remarks to be found in it.

Judgment.  
BUTON,  
C.J.O.

It is in some respects a stronger case, as in that case the cordwood encroached upon the travelled part of the road, but the injury was not sustained by reason of the driver coming into contact with the obstruction, but by reason of the animal taking fright at it.

If in place of these ties coming upon the side of the highway as they did by reason of an accident, some person had placed a booth or show of some kind there, with a flag or other emblem calculated to frighten horses, although it might have been a nuisance for which the proprietor might be liable to an action or indictment, yet as it did not obstruct the travelled road, it might admit of considerable doubt whether the pathmaster, whose duty it is to see that the travelled portion of the road is kept in repair, could interfere.

There is a case referred to in the *Maxwell* case, *Kingsbury v. Dedham*, 13 Allen 186, in which Chief Justice Bigelow, dealing with a statute wider than our own, uses language which I think very applicable to the case we are considering. He says: "Upon careful consideration, it seems to us that it would be giving an unwarrantable interpretation to the statutes which impose on towns the duty of keeping the highways within their respective limits in safe and convenient condition, and render them responsible for injuries arising from defects or want of reasonable repairs, to hold that the existence of an object within the limits of a way, or the state of the surface of

Judgment.BURTON,  
C.J.O.

the road, which may cause horses to take fright, constitutes a culpable neglect. \* \* A town is not liable for every object which renders a way unsafe or inconvenient for travellers to pass over it; but only for such as not only render the way unsafe and inconvenient, but also defective or out of repair; and the injury must be attributable to the defect or want of repair."

The point was discussed, but not decided, in *Rounds v. Stratford*, 26 C. P. 11, in which Gwynne, J., says (p. 19): "If I could have formed the same inferences from the facts as the learned Chief Justice Harrison who tried the case, did, a very important question, it appears to me, would have been opened, namely, what is the extent of the liability of these municipal corporations in respect of nuisances, which may not amount to defect in repair, committed within the limits of highways, but not on or near the portion set apart for travelling upon with horses, by strangers against the will of the municipalities and tortiously as to them."

I am of opinion that on the facts of this case no actionable negligence has been shewn on the part of the corporations, and judgment should be given in their favour.

I agree with the learned Judge in his decision as to the other defendant. His leaving the ties upon the highway for the length of time he did was a nuisance: see *Brown v. Eastern and Midlands R. W. Co.*, 22 Q. B. D. 391; *Harris v. Mobbs*, 3 Exch. D. 268; *Wilkins v. Day*, 12 Q. B. D. 110.

The learned Judge has found that it had the effect of endangering the use of the road itself by persons travelling on it, and that the horse the plaintiff was driving took fright by reason of the ties being left in that position. It appears to me, therefore, that he was left without any defence.

Nothing is said in the judgment as to the highway being out of repair by reason of the want of railings; I presume, therefore, that that was not pressed.

The appeal should be allowed as to the townships and the judgment confirmed as to the defendant Taylor.

Judgment.

BURTON,  
C.J.O.

OSLER, J. A. :—

In its facts this case can hardly be distinguished from *Maxwell v. Clarke*, 4 A. R. 460.

There it appeared that on one side of a travelled road, which the defendants were bound to keep in repair, was a declivity along which some blocks of wood had been thrown by a stranger. Some of the wood was on the travelled part of the road, but there was a considerable part of the road free from obstruction and in no way defective. The plaintiff's horse took fright at the wood, shied, and threw him off, and he was injured. It was held that the municipality was not liable.

The case of *Custor v. Uxbridge*, 39 U. C. R. 125, was expressly approved. The Court said it "established no new principle. It merely applied the well established doctrine in a case where the safety of travellers on the highway was endangered by obstacles placed on the road by a stranger, just as it might have been endangered by an excavation made in the highway by a stranger, the effect in either case being to put the road out of repair." But the case was distinguished, whether rightly or not, I need not say, from the case then in judgment on the ground that in it it appeared that the roadway was encumbered by telegraph poles, one of which upset the vehicle in which the plaintiff was riding, whereas, in the latter, although the wood may have encroached a few feet on that part of the highway on which it was possible to ride, the plaintiff's horse did not come in contact with it, and would have passed it without difficulty or inconvenience if he had not been startled by its appearance.

It was held in short that the obligation to keep in repair did not include the duty of keeping it free from objects, which, while they do not block the way of the



**Judgment.** traveller, may, nevertheless, be calculated to frighten  
**OSLER,** horses.  
**J.A.**

The decision, as I read it, assuming negligence or negligent ignorance on the part of the corporation to have been proved, would have been different had the plaintiff suffered in consequence of having come into actual collision with the wood, thus shewing that the way had been actually obstructed and damage sustained by reason thereof.

I may add that the proposition laid down in *Castor v. Uzbridge*, 39 U. C. R. 125, as to the duties of the municipality, though as shewn by the head note it was not necessary for the decision of the case, is quite within that which had previously been affirmed by this Court in *Toms v. Whitby*, 37 U. C. R. 100. The case is referred to by Gwynne, J., without disapproval, in *Portland v. Griffiths*, 11 S. C. R. at p. 344, and it has frequently been followed in other Courts. The only case in which I have seen any doubt thrown upon it, is in the dissenting judgment in *Pratt v. Stratford*, 16 A. R. 5, and it appears to have received legislative approval in the recent amendments to section 531 of the Municipal Act.

Returning to the case at bar, the essential facts may really be stated word for word, (substituting "railway ties" for "firewood,") as in *Maxwell v. Clarke*, 4 A. R. 460.

It is not necessary to say whether I agree with that decision, but it appears to me that it rules the present case as regards the defendant townships, and therefore that the appeal as to them must be allowed with costs.

As to Taylor, it is equally clear that his appeal cannot succeed. He was making an improper and unreasonable use of the highway by leaving these ties upon it. They were proved to be an object calculated to frighten horses, and which had frightened them before the plaintiff's horse shied at them. They were an actual nuisance in the highway, and the act of the defendant in negligently leaving them there directly caused the injury the plaintiff has sustained.

I refer to *Howarth v. McGugan*, 23 O. R. 396, which is also very like the present in its facts. Judgment.

The appeal of Taylor must, therefore, be dismissed with costs. OSLER,  
J.A.

MACLENNAN, J. A. :—

I agree.

*Appeal allowed in part.*

R. S. C.

### DALE V. WESTON LODGE.

*Insurance—Life Insurance—Benevolent Society—"Member in Good Standing"—Domestic Forum.*

Where the rules of a benevolent society give to a member, dissatisfied with a decision as to sick benefits, a right of appeal to a domestic forum, the widow of a member, whose application for sick benefits has in his lifetime been refused, and who has acquiesced in that decision and has not appealed, cannot recover sick benefits.

Judgment of MEREDITH, J., reversed.

Where, however, the widow of "a member in good standing" is entitled to certain pecuniary benefits and the status of the member has not been passed upon by the society in his lifetime, an action by the widow will lie, and the status of the deceased member at the time of his death is a question of law to be determined in the usual way.

In the present case the fact that the deceased member was at the time of his death in arrear for dues was held, having regard to the constitution and rules of the society, not to deprive him of his status, and the widow was held entitled to recover.

Judgment of MEREDITH, J., affirmed.

THIS was an appeal by the defendants from the judgment of MEREDITH, J. Statement.

The action was brought by the plaintiff, who was the widow and administratrix of one George Dale, to recover the amount of "sick benefits" which, it was alleged, the deceased was in his life time entitled to receive from the defendants, and the amount of "funeral benefits" and "widow's benefits," which the plaintiff was entitled to

**Statement.** receive under the constitution and by-laws of the defendants by virtue of her husband's membership.

The defences relied upon were that the deceased was not a member in good standing at the time of his death, and that, therefore, under the constitution and by-laws, was not, nor was the plaintiff, entitled to be paid anything; and also that no action lay because the constitution and by-laws directed that before legal proceedings could be resorted to an appeal should be taken to the Grand Lodge of the order from the decision of the subordinate lodge refusing to pay the claim.

The action was tried at Toronto on the 4th of March, 1896, before MEREDITH, J., who on the 4th of May, 1896, gave judgment as follows in favour of the plaintiff.

MEREDITH, J.:—

The plaintiff's husband was a member of the defendants' lodge at the time of his death and for fifteen years continuously before; until his last sickness prevented him, he attended its meetings and took part in its ceremonies and business just as any other member; and during his sickness he was visited, as the defendants' by-laws require, as a member of the lodge, by other members duly appointed for the purpose of visiting sick members; all that was denied him was the money which he claimed as "sick benefits"; and that was denied upon the claim that he was not in good standing in the lodge when he became incapacitated by sickness; it is not denied that, had he been in good standing when he made his application for sick benefits, he would have been entitled to them from that time until the time of his death; so that the substantial question in issue upon the merits of the case is: Was he in good standing then? No other application was made in the manner provided for in by-law 52.

Now the contention is that he was not in good standing then, because he was in arrears for some dues. These dues.

were, under by-law 30, payable quarterly in advance ; but as a matter of fact they were not so collected ; the amount being small, and there being apparently no penalty, and perhaps no very great deprivation for non-payment for any period less than twelve months, members commonly paid the year's assessment, six dollars, at the end of the year ; and this practice seems to be recognized by by-law 17, in the provision for calling special attention of members owing for eleven or fourteen calendar months to the provisions of the by-laws in such cases ; that is, by-law 57 providing for suspension of a member twelve calendar months in arrear, or extension of the time for another three months.

On the same day that the application for sick benefits was made, this member paid his arrears, amounting to three dollars, and paid another three dollars, to cover fees to the end of that year ; and on the same day he was paid twelve dollars by the lodge for work done by him for them previously thereto ; and yet it is said he was not in good standing. I cannot think that that can be. There is no definition or interpretation of the term "good standing" given in the constitution or by-laws of the order or of this lodge, though it is frequently used throughout them. Then, without any provision that the mere nonpayment promptly of dues, where the practice is to let them accumulate, as I have stated, and where payment of such accumulation before suspension is treated as valid payment, and meanwhile the member is accorded all the other rights and privileges of membership, though by-law 69 provides that a member three months in arrear shall not be allowed to speak or vote on elections of officers or appropriation of funds, it would be going quite too far to say that merely being in arrear as this member was, and especially where he had a larger contra account, put him in bad standing, and so deprived him of the financial benefits of his membership.

And the constitution and by-laws seem to me to support this view. Clause 16 and by-law 39 both refer to a mem-

Judgment.  
MEREDITH,  
J.

**Judgment.** ber "in good standing and clear on the books," indicating  
**MERRIDITH,** that the latter is not included in the former. Then, under  
**J.** the constitution and by-laws of 1879, it was expressly provided that (by-law 75) "no general or sick benefits shall be payable by the lodge to or on behalf of any brother who, when his sickness began, was more than three months in arrear." This provision was entirely left out of the constitution and by-laws of 1886, and those of 1892 which are now in force; although the provisions as to suspension for twelve or fifteen months' arrears, and preventing speaking or voting on the election of officers or appropriation of funds for more than three months arrears were retained.

It seems to have been very fitting to have repealed by-law 75, having regard to the general practice in this lodge as to allowing dues to accumulate before payment; for otherwise most of the members would be much of the time disentitled to the substantial benefits of membership.

It cannot but strike one as most unreasonable to say that a member who has the right to pay his dues and does pay, and is in every way treated as a member, is in bad standing, and disentitled to the substantial benefits of his fifteen years' membership, because his application for sick benefits was made earlier in the same day that the payment of his arrears was made. It may be observed that he was not in arrear to the Grand Lodge, for clause 41 required payment by the officers of the subordinate lodge semi-annually of the fee for each unsuspended member.

It is said that there has been a ruling of some of the higher officers of the society, that a member who has not paid his dues, as required by the by-laws, is not in good standing, and not entitled to such benefits as those in question; but, as that question must depend largely upon the by-laws of the subordinate court, and to some extent upon the circumstances of the case, such ruling affords no aid, to me, without the reasons for it; it may have been quite right but wholly inapplicable to this case, for instance, it

may have been a case coming under the former by-law 75, in which there were more than three months' arrears. Judgment.

On the facts of this particular case, under the present laws of the society, I can come to no other conclusion than that the member was in good standing when he regularly made his application for sick benefits; and that he should have been allowed such benefits to the time of his death, after deducting, as the by-laws provide, his unpaid accruing dues out of them.

MEREDITH,  
J.

But it is said that an action at law will not lie because relief has not yet been fully sought within the society; and there should have first been an appeal to the Grand Lodge from the rejection by the subordinate lodge of the claim. There is nothing in the constitution or by-laws of the subordinate lodge requiring or permitting such an appeal, though appeals in other cases are fully provided for; but there is a general provision in the by-laws of the Grand Lodge (105), permitting an appeal by any lodge, or member, against any decision of a lodge, or of any officer of a lodge, or of any officer of the Grand Lodge. Now, assuming that under this by-law the member might have appealed, there is no such right in his legal personal representative, nor in his widow; it is only a lodge, or a brother, who may appeal; and as there is no limit to the time for appealing, nor any provision that any right shall be lost in case there is no appeal, there is nothing that I can perceive preventing, or postponing, the plaintiff's ordinary right to resort to this Court for the recovery of her valid money demand.

The widow's own claim is of course not open to this objection; it arose only upon her husband's death; and she never had any right of resort to any means within the order for the enforcement of her claim; and, the husband being, as I have considered, in good standing at the time of his death, so much of the widows' and orphans' benefits as has become payable, should be paid to her unconditionally; the rest will be subject to the contingencies provided for in by-laws 56, 57 and 58.

Judgment.

MEREDITH,  
J.

There will be judgment for the plaintiff upon the issues joined; the Registrar will compute the amounts payable to the plaintiff as administratrix in respect of sick and funeral benefits, and personally in respect of widow's benefits; and there will be judgment for the recovery of these amounts accordingly.

An account was taken by the Registrar, and judgment was entered in favour of the plaintiff as administratrix for \$127.50 for sick benefits and funeral benefits, and as widow for \$250.

The defendants appealed and the appeal was argued before BURTON, OSLER, and MACLENNAN, JJ.A., on the 19th and 20th of November, 1896.

*Shepley, Q. C., and F. C. Cooke*, for the appellants. Being in good standing was a condition precedent to any right arising on the part of the deceased member, or on the part of the plaintiff as his representative and widow. The deceased member at the time of his application for sick benefits had not paid his dues, and he was, therefore, not in good standing. Being in good standing, means "free from arrears of due": *Bacon on Benefit Societies*, 2nd ed., secs. 414 and 415; *McMurray v. Supreme Lodge*, 20 Fed. Rep. 107. The constitution and by-laws of the order provide that claims of this kind must be adjudicated upon by tribunals in the order itself, constituted for that purpose, and these tribunals should have been resorted to before any action was brought: *Essery v. Court Pride*, 2 O. R. 596; *Field v. Court Hope*, 26 Gr. 467.

*H. E. Irwin*, for the respondent. The plaintiff was not bound to resort to the tribunals of the order. Such tribunals may reserve to themselves the right to adjudicate upon questions of doctrine or policy, but cannot take to themselves exclusive jurisdiction where contractual rights are in question: *Bauer v. Samson Lodge*, 102 Ind. 262; *Railway Passenger Association v. Robinson*, 38 Ill. App. 111; *Supreme Council v. Garrigus*, 104 Ind. 133; *Rigby v.*

*Connot*, 14 Ch. D. 482. Moreover, the plaintiff not being a member of the order, could not in any event be bound by any regulations of the kind: *Strasser v. Staats*, 20 Ins. Law Jour. 551. The deceased member was in good standing at the time of his death. Good standing does not mean freedom from arrears. Some act must be done by the authorities of the lodge to suspend or expel the member: *Munson v. Grand Lodge*, 30 Minn. 509; Bacon on Benefit Societies, 2nd ed., sec. 414; *Scheuffleur v. Ancient Order of United Workmen*, 45 Minn. 256; *Lazensky v. Supreme Lodge*, 17 Ins. Law Jour. 24. Even if, however, good standing can have attributed to it the wide meaning of freedom from arrears, the deceased member was fully qualified. He was not in fact in arrears but had an admitted account against the defendants for services rendered by him.

*Shepley*, Q. C., in reply.

May 11th, 1897. OSLER, J. A. :—

The defendants were, by their present name, for many years an unincorporated society in connection with, or a branch of, a society known as "The Grand Lodge of Ontario of the Independent Order of Oddfellows," which was, on the 5th of February, 1878, incorporated under the then Act relating to Benevolent, Provident, and other Societies: R. S. O. (1877) ch. 167; R. S. O. (1887) ch. 172.

The deceased George Dale was admitted as a member of the branch society on the 6th August, 1878, and so continued until the month of June, 1886, when the branch society became incorporated as a separate corporation, subordinate to the Grand Lodge, under the provisions of sections 6 and 7 of the Benevolent Societies Act, R. S. O. (1877) ch. 167, under the name "Weston Lodge, No. 200, of the Independent Order of Oddfellows of Weston, Ontario," with the constitution and by-laws set forth in the declaration of incorporation.

Thereafter the deceased became and continued until his



Judgment.

OSLER,  
J.A.

death, on the 4th of January, 1894, a member of the society so incorporated.

The constitution adopted by the defendants at the date of their incorporation was that which had been ordained by the Grand Lodge as the constitution of all subordinate lodges working under its immediate jurisdiction. This constitution provided that the defendants should have power from time to time to adopt such by-laws and resolutions as they might deem expedient, not contrary to their constitution or to the constitution or by-laws of the Grand Lodge, or to the principles or customs of the order; and further, that the constitution should not be altered, amended, suspended, or annulled, unless by action of the Grand Lodge of Ontario.

On the 14th of August, 1890, the Grand Lodge ordained an altered and amended constitution for subordinate lodges, which appears to have been accepted and adopted by the defendants; and a copy thereof with their then existing by-laws was produced by the plaintiff containing a certificate of the membership of the deceased and his admission as such by initiation on the 6th of August, 1878. The date at which this certificate was issued was not proved, but it is bound up with the copy of the constitution and by-laws last referred to, purporting to be printed in the year 1892.

A similar certificate was also bound up with the deceased's copy of the former constitution issued in 1879, being the constitution adopted at the time of the defendants' incorporation in June, 1886.

The questions are, whether the husband of the deceased was, when he made his application for sick benefits, and at the time of his death, a member of the society in good standing, within the meaning of the constitution and by-laws; and whether the plaintiff, in her representative capacity or in her own right, can maintain an action for the benefits claimed, or is confined to such relief as she may be able to obtain within the society itself by appeal to its domestic tribunals.

It was conceded that the provisions of the constitution and by-laws of 1890, either expressly set forth therein, or drawn into them by reference, were those which governed the rights of the parties.

By clause 51 of the constitution and by-law 50, every member of the lodge in good standing if rendered incapable of following his usual or other attainable occupation by sickness or disability is entitled to receive a benefit during such sickness or disability—when of the degree of the deceased—of \$4 per week, for a period not more than twelve months, should the sickness continue so long, and if for a longer period then during such longer period \$1 per week. A physician's certificate is to accompany all applications for benefits except in certain cases. The amount which the deceased should have received, according to the plaintiff's contention, up to the time of his death was about \$283.

For funeral benefits, by-law 54 provides that on the decease of any brother in good standing the sum of forty dollars shall be allowed for funeral expenses, which by clause 53 of the constitution is to be paid to the widow.

Clause 55 of the constitution and by-law 55 provide for widows' and children's benefits. The widow of any deceased member of the lodge in good standing at the time of his death, he having attained the degree of the deceased, is to receive from the funds of the lodge \$250.

The deceased made his application for sick benefits on the 7th of July, 1891, accompanied by a physician's certificate, and there is ample evidence that his illness or disability continued from that time until his death.

He was on the day his application was received in arrear in respect of two quarterly dues, in all three dollars. Later in the same day, having received payment of a small debt the defendants owed him for work, he paid them six dollars, which discharged his arrears and cleared him until the 1st of January, 1892. During February and April, 1892, he paid in all three dollars more, which cleared him until the 1st of July of that year. He paid

Judgment.

OSLER,  
J. A.

**Judgment.** nothing after this, and at the time of his death on the 4th or 5th of January, 1894, was in arrear nine dollars, the dues for one year and a-half.

**OSLER,  
J.A.**

Dale's application for sick benefits was, on the evening of its receipt, referred to the sick or visiting committee of the lodge, who reported that they found him not entitled to sick benefits. The report was received and a resolution passed by the lodge that he should be paid twenty-five dollars as special relief. This seems to have been granted under by-law 61, providing for relief in special cases, and from time to time thereafter other sums amounting in all to \$196 or thereabouts were granted in like manner.

The plaintiff's claim for the sick benefits stands upon a different footing in some respects from her claims for the other benefits. If for any reason Dale himself could not have recovered the former, she cannot do so. Her right to the others depends, I think, simply upon her husband's status in the society at the time of his death. If he was then a member in good standing there is no reason why she should not recover, for there is nothing in either the constitution or the by-laws which requires her to submit her rights to the adjudication of the society, or which ousts the jurisdiction of the Court to construe the contract between the society and its deceased member. Different it would be if the society had during Dale's lifetime passed upon his status. In that event, if the constitution and rules so require it, he should have appealed from the decision and procured himself to be reinstated.

Then as to the claim for sick benefits: clause 12 of the constitution of 1890, which may be read with clauses 1 and 71, imports into that constitution the constitution and by-laws of the Grand Lodge, the whole forming the contract between the order and each member thereof. By the constitution of the Grand Lodge, clauses 3 and 26, and by-laws 40, and 105 to 110, provision is made for an appeal to the Grand Lodge by any brother of the order from any decision or order of a lodge; the time within

which an appeal is to be taken is specified, and the procedure on the appeal and the powers of the Grand Lodge in its investigation of the matter defined. The decision of the Grand Lodge, unless reversed on a further appeal to the sovereign lodge, is final. Clauses 58 to 66 of the defendants' constitution appear to me to have no bearing upon any of the questions involved in this case, as they relate to trials, suspensions, and appeals, in respect of charges other than the non-payment of dues. But the other provisions referred to, rendered it, in my opinion, imperative upon the deceased, if he objected to the decision of his lodge not to pay him anything for sick benefits, to have appealed therefrom, in accordance with the contract between himself and the order.

Judgment.

OSLER,  
J.A.

He could not himself have questioned that decision in an action to recover these benefits; and I do not see how his widow can be in any better position. He seems, moreover, to have been present at the meeting at which it was arrived at, to have been aware of the ground on which it was based, and to have accepted the relief subsequently given to him in the character in which it was granted.

I am, therefore, unable to agree with my learned brother Meredith's judgment on this part of the plaintiff's case.

The other branch of the plaintiff's claim stands in a different position. The refusal to pay the sick benefits does not affect it. That refusal did not involve, and was not based upon, a determination of the status of the deceased. It is plain from the evidence of Barker, the permanent secretary, that the report of the committee against the deceased's application must rest altogether upon the ground that as he was in arrear at the moment it was received, though he paid up in full within an hour or two afterwards, he was disentitled to sick benefits by virtue of by-law 75, in the former constitution of the society, which provides that no funeral or sick benefits shall be paid by the lodge, or on behalf of any brother, who, when his sickness began, was more than three months in arrear.

Judgment.

OSLER,  
J.A.

As no such rule is to be found in the existing constitution the decision was probably wrong, but with that we have nothing to do. It cannot, however, be pressed further than it actually goes, and it is certainly not a decision that the deceased was not in good standing. That question is, therefore, open in this case, as the plaintiff is not a person who, by the terms of the constitution, is required to submit her claim to the decision of the Grand Lodge. *Primâ facie* the deceased, as the holder of a certificate issued in 1892, was a member in good standing then, and at the time of his death. It is for the defendants to prove that he was not, and they rely wholly upon the fact that at the latter date he was actually in arrear for dues for one year and a half—July, 1892, to January, 1894.

In my opinion, a member who is in arrear is not by that circumstance alone, and in the absence of some action taken against him, in or by his lodge, deprived of his status. There is no definition of the term "good standing" in the constitution or by-laws of the defendants or in those of the Grand Lodge, nor any provision in either that upon non-payment of dues or being in arrear for a specified time a member shall *ipso facto* be suspended, or as the rules of the Foresters Association say, "stand suspended." The case is thus distinguishable from *Wells v. Independent Order of Foresters*, 17 O. R. 317; and see some American cases cited in Bacon on Benefit Societies, 2nd ed., sec. 414, pp. 822, 823.

Throughout the constitution and by-laws there is a marked contrast between status and being in arrear: see clauses 16 and 17 of the former, and 39 of the latter.

Clause 41 of the constitution requires the lodge to make semi-annual returns to the Grand Lodge of the work of the previous term, accompanied by the sum of twenty-five cents for each unsuspended member; and clause 68 provides that any member of the lodge who is in arrear for dues for one year shall be reported to the lodge by the permanent secretary, and on such report shall be dropped from membership. So, too, by-law 65 provides that any

brother being twelve calendar months in arrear shall on due report thereof to the lodge, be declared to be suspended from membership, *he having been first notified of the action that would be taken*, a record of which must be entered on the minutes.

Judgment.

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OSLER,  
J.A.

Dale never was suspended nor any action taken against him under any of the foregoing provisions, and we should presume, if it were necessary to do so, that the defendants complied with clause 41, and reported him as a member to the Grand Lodge up to the last.

By-law 51 is entirely opposed to the defendants' contention, as it provides that whenever any benefit shall accrue to the account of a brother payment shall be required therefrom of such quarterly dues as may be chargeable to the close of the then current term.

Inasmuch, therefore, as these dues are always payable in advance at the beginning of the term, and as benefits are only payable if a brother was in good standing when he became entitled to them, it seems to follow that to be in arrears for dues, which dues must be deducted from any subsequently accruing benefits, does not deprive the member of his status. Status may be lost by suspension after the proper proceedings for nonpayment of dues or for any other cause: and it may also be lost pending a trial thereof, by the exhibition of charges involving suspension, reprimand, or expulsion. Cons. Cl. 8-58; By-laws 65, 53. But in my opinion so long as he is neither suspended nor under charges, there is nothing in the constitution or by-laws which would justify us in holding that he is not a member in good standing, even though he may by reason of being in arrear be subject to some temporary partial deprivation of his ordinary rights such as when in arrears for three months, the right to speak and vote on the election of officers or the appropriation of funds.

I think, therefore, that as regards the funeral and widow's benefits the judgment should be affirmed, but as to sick benefits should be varied by reducing it by the sum allowed therefor, viz., \$87.50.

Judgment. **MACLENNAN, J. A. :—**

**MACLENNAN,**  
**J.A.**

This appeal concerns a claim for sick benefits, and also for funeral benefits and benefits to widow and orphans. The first claim depends upon some considerations not applicable to the other two. They all depend, however, upon a question of good standing on the part of the deceased member which must first be considered. The sick benefits claim is one which, if well founded, accrued to the member in his life time, and ought to have been paid to himself; while the other claims accrued to the plaintiff as his widow, or administratrix, at his death. The defence is that all the claims depend upon the member having been in good standing in his lodge when they respectively accrued, and it is alleged that the required condition was not fulfilled. It is clear from the constitution and by-laws of the lodge that the condition referred to is essential. That is apparent from clauses 51, 52, 53 and 55 of the constitution, and also from by-laws 50, 53, 54 and 55. There is, however, no definition of the term "good standing" to be found anywhere, and we must ascertain its meaning as best we can from the constitution and by-laws at large. It is not disputed that when the claim for sick benefits first arose, and thence until and at his death, the deceased was and continued to be a member, and the sole question is whether he was in good standing. The only ground on which his standing is attacked is that when his sickness began he was in arrear in the payment of dues for one year, amounting to six dollars. His sickness began shortly before the 1st of July, 1891, and on the 7th of July, at the quarterly meeting of the lodge held on that day, he applied for sick benefits, and at the same time paid all arrears and also his dues in advance up to the end of that year. His application for sick benefits was refused, but shortly afterwards the lodge granted him an allowance in the nature of special relief, which he accepted. After a very careful examination of the constitution and by-laws I am of opinion that merely being in

**arrear** for dues does not alone constitute a want of good **standing** in the lodge on the part of a member, and I agree, **in the main**, with the reasons for the same conclusion of the **judgment** in review. I think it clear that something more than mere nonpayment is necessary. Judgment.  
MAOLENNAN,  
J.A.

Clause 57 of the constitution provides for fine, reprimand, suspension or expulsion of a member for violation of the laws, principles or practices of the order. Clause 58 and following clauses provide for trial of charges involving reprimand, suspension or expulsion, except for nonpayment of dues. Clause 65 speaks of suspension for nonpayment of dues, and clause 67 of membership being dropped for the same cause, and clause 68 provides that when a member is in arrear for one year he shall be reported to the lodge and shall be dropped from membership, unless the time of payment is extended by resolution of the lodge. That is all that the constitution contains which seems to have any bearing on the question, and I now pass to the by-laws. By-law 36 provides for the reinstatement of a member suspended or dropped for nonpayment of dues; 37 declares that the dues shall be \$1.50 per quarter, and that on no account shall nonpayment be excused, but payment shall be made at or before the first regular meeting in each quarter; and 39 authorizes a visiting card to be given to a member in good standing, and clear on the books. This by-law seems to indicate that a member might be in good standing, although not clear in the books, and that good standing alone will not entitle him to a card. We then come to by-laws 50, 51, 52, 53, 54 and 55, which are those which provide specially for the three kinds of benefits now in question; and while good standing is made a prerequisite for all of them, there is not a single word making it requisite that these members shall also be free from arrears and clear in the books. I think if it was intended that freedom from arrears should be essential to the allowance of these benefits here is the place where it would have been expressed, particularly as 51 provides for the deduction from any benefits of the dues chargeable to the close of the



**Judgment.** current term, and as 53 provides that no member shall be entitled to benefits while charges affecting his right to benefits are pending against him.

**MACLENNAN,**  
**J.A.**

The remaining by-laws which throw any light on the question are 65, 66 and 67. 65 provides that a member being twelve months in arrear, shall on report thereof to the lodge be declared to be suspended from membership by the head officer of the lodge called the "Noble Grand," he having been first notified of the action to be taken. A record of the suspension must also be entered in the minutes. Suspension, however, was not obligatory even for twelve months' arrears, for the lodge might extend the time for payment on account of special circumstances for a further period not exceeding three months. By-law 66 disables a member in arrear for more than three months from speaking or voting in the election of officers, or for the appropriation of funds, and 67 excludes from attendance at the lodge during suspension and until all dues are paid.

We have, therefore, a number of express provisions in the constitution and by-laws relating to the conduct of members. There are provisions for charges of misconduct being made, and for their trial and punishment, by fine, reprimand, suspension or expulsion. Several of the by-laws expressly declare what the consequences of being in arrear for dues shall be. For mere nonpayment punctually, on the quarter day, all that is said is that it shall not be excused. For three months' default, the penalty is disability to speak or vote in the lodge on two particular subjects. For twelve months' default there may be suspension with total exclusion from attendance at the lodge; but even then suspension is only to be after report to the lodge of the default, notice to the defaulter of intention to suspend, and a right to an extension of time for payment for three months longer under special circumstances. There are all these express provisions as to the consequence of neglect to pay dues, but not one word about forfeiture of benefits. It is inconceivable to me that if that was intended to be one of the consequences it should not have been expressed, for that is the most serious penalty of all.

The express provisions shew that mere nonpayment of dues, while not to be excused, is treated with indulgence. There may be an arrear even for so long as fifteen months without suspension; and even after suspension there may be reinstatement on payment of all arrears. I think it is wholly inconsistent with the whole tenor of the constitution and by-laws that a man who might be behind with his quarterly payment for a day or a week, owing to mere accident, or temporary inability to pay, should have ceased to be in good standing within the meaning of the benefit clauses, so as to have forfeited his right to benefits in case of sickness or death during such default. I am, therefore, of opinion that the deceased was a member in good standing in his lodge on the 7th of July, 1891, notwithstanding that he was then in arrear for his dues; and that he was also in good standing at the time of his death, although he had not paid his dues between June, 1892, and the 1st or 4th of January, 1894, when he died.

Judgment.  
MAOLENNAN,  
J.A.

Even if it could be said that he was not in good standing on the 7th of July, 1891, when he paid up all arrears, and in advance to the end of the year, that payment unquestionably restored his good standing. After that time and until his death the lodge paid him in special benefits about \$200, and thereby not only treated him as in good standing, but might, if they chose, have deducted from those payments the dues which accrued between June, 1892, and the time of his death, during the greatest part of which time he was a patient in the lunatic asylum.

I am, therefore, clearly of opinion that no objection can be made to any of the claims on the ground of want of good standing on the part of the deceased.

It is, however, further objected, that the plaintiff cannot recover because the claims are a matter for determination by the domestic forum of the lodge, for which provision is made by the constitution and by-laws of the order, with a right of appeal to the supreme lodge. It is said that the matter of the sick benefits was so determined in the lifetime of the member, adversely to him; that he might have

Judgment.

MACLENNAN,  
J.A.

appealed against the decision, but did not, and submitted to it, and that the plaintiff, his administratrix, is bound as the deceased was bound. It is also said that the other claims might be enquired into and determined in like manner, and that the Court has no jurisdiction to grant relief. This objection in my opinion can clearly not be made to the claims for funeral and widow and orphan benefits. It is only a member himself who can invoke the judgment of the lodge. The deceased never could have done that in respect of these claims, for they only accrued at his death, and could only be made by his personal representative on behalf of his widow and his estate. It is different as to the sick benefits claim. That claim was made by the deceased to the lodge, was considered by them and was rejected. The question is, was he bound by that decision? It is said he might have appealed against it to the Grand Lodge within two months, and that by clause 64 of the constitution he could not carry his case to the Court until it had been adjudicated upon both by the Grand Lodge and the Sovereign Grand Lodge. It is also pointed out that by clause 12 it is declared that the constitution and by-laws of the lodge, and of the Grand Lodge of Ontario, constitute the contract between the order and the member, and that he is to be bound by and subject to every claim and article therein contained, in every particular. Upon these clauses it must be conceded that if they are applicable the deceased's claim for sick benefits was barred in his life time. I have had great doubt upon this question but upon the whole I think these clauses do not apply to such a claim. The lodge is a corporation, and therefore capable of being sued for any legal demand, by any of its members. I think the deceased is shewn to have had a legal demand upon the defendants and he was entitled to sue for it in the civil courts unless that right is clearly excluded. Sections 3 and 26 of the constitution, and numbers 40, 105, 107, 108, 109 and 110 of the by-laws of the Grand Lodge are large enough to include a disputed claim for sick benefits, but

none of them assume to exclude the jurisdiction of the ordinary courts. That depends entirely on clause 64 of the constitution of the subordinate lodge, and that clause is, I think, clearly confined to trials for offences and matters specified in clause 58 and subsequent clauses, which do not appear at all to include disputed benefits. If the clause had been applicable to this case, then I think it would have precluded the deceased from bringing an action until he had first prosecuted the appeals which are there provided for, but being otherwise the jurisdiction of the Court is not excluded: *Scott v. Avery*, 5 H. L. C. 811.

Judgment.  
MAOLENNAN,  
J.A.

I think, however, the claim for sick benefits must be disallowed on another ground. By-law 61 provides for special relief being granted to a member who has been reduced to a state of pecuniary distress by any sudden or unlooked for dispensation. When the application of the deceased for sick benefits was refused by the lodge, they acted under by-law 61, and made him a special grant of aid to the amount of \$25. He acquiesced in the decision upon his claim for sick benefits and accepted the special relief. That special relief was repeated afterwards from time to time, and the sums paid in that way before his death amounted to a large sum, about \$200.

It is evident that if he had persisted in his claim for sick benefits, the lodge would not have given him the special relief, and I think he must be taken to have accepted that in lieu and satisfaction of his other claim.

While, therefore, I think the widow and orphans' claim, and the funeral benefit claim must be upheld, the judgment must be reduced by the sum of eighty-seven dollars and fifty cents, being that part of it which represents the claim for sick benefits. With that alteration of the judgment the appeal should be dismissed.

BURTON, C. J. O.:—

I agree with my brother Osler.

*Judgment varied.*

R. S. C.

## SEYMOUR V. THE TOWNSHIP OF MAIDSTONE.

*Ditches and Watercourses Act — Municipal Corporations — Damages—  
R. S. O. ch. 220.*

A township municipality, within the limits of which a ditch is constructed under the provisions of the Ditches and Watercourses Act, in accordance with the award of the township engineer, made in assumed compliance with the requisition of the ratepayers interested, is not liable for damages caused to a resident of the township by the construction of the ditch, even though the requisition be in fact defective.

Judgment of the Drainage Referee, affirmed.

**Statement.** THIS was an appeal by the plaintiff from the judgment of Britton, Drainage Referee.

The following statement of the facts is taken from the judgment of OSLER, J. A.

The statement of claim sets forth two causes of action: the first for the construction by the defendants of a ditch or drain under the provisions of the Ditches and Watercourses Act, R. S. O. ch. 220, and connecting it with another drain constructed under the drainage clauses of the Municipal Act whereby more water was brought into the latter than it was able to carry away and the plaintiff's land was consequently flooded and overflowed; and second for refusing to permit the plaintiff to drain his land into another municipal drain constructed near his land but not actually adjoining it, being separated from it by a township road or highway.

The action was referred to the Drainage Referee for trial on the 4th May, 1896, and was tried before him on the 29th and 30th May. Judgment was given on the last mentioned day dismissing the action.

The substantial question in the case is whether the defendants are liable for damages said to have been caused by the drain alleged to have been constructed by them under the Ditches and Watercourses Act.

It appeared that some time in the month of May, 1892, one James Hyland, the owner of the west halves of lots twenty-eight and twenty-nine in the 3rd concession of Maidstone, was desirous of having a drain made along the

east end of his lots, to obtain a proper outlet for which it would have to be carried through or would affect the lots of several of his neighbours. A meeting of the parties interested was held pursuant to section 5 of the Act but no agreement was arrived at as to how or by whom the drain was to be made. Hyland thereupon, pursuant to section 6, filed a requisition with the township clerk describing the ditch required to be made specifying the lands which would be affected by the proposed drain and the owners thereof in order that the township engineer might be put in motion to award and determine the locality of the drain and what portions of it should be done by the respective parties interested. Statement.

The requisition having been communicated to the engineer by the clerk and notice having been given to the parties, the engineer met them at the time and place specified in the requisition and subsequently on the 23rd of June, 1892, made his award as required by the 8th section of the Act describing the course and extent of the drain and allotting the work thereon to be done by the parties interested including the plaintiff in the manner therein specified. The plaintiff and others appealed from the award to the County Judge in the manner provided by section 11 of the Act, but their appeal was dismissed and the award confirmed. With the exception of the plaintiff, the parties to the award complied with it, doing their prescribed portions of the work, and the plaintiff having failed to do his within the time prescribed, the engineer, as provided by section 15, contracted for the performance of that portion with a third person by whom it was done and the drain was thus completed, the defendants paying, as the statute requires, the cost of that part of the work which the plaintiff had refused to do and charging it back to and collecting it from him.

The drain as laid out by the engineer and specified in his award was connected with the drain constructed by the defendants in 1890, under their by-law 326, and there was evidence that this was done at the request and with the assent of the plaintiff.

**Statement.** The appeal was argued before BURTON, OSLER, and MACLENNAN, J.J. A., on the 1st and 2nd of December, 1896.

*F. E. Hodgins*, for the appellant. The requisition and report are public documents and are *prima facie* proof of the facts therein stated: *Warren v. Deslippes*, 33 U. C. R. 59; *York v. Osgoode*, 24 S. C. R. 232. From these documents it is clear that more than five persons were interested and therefore there was no jurisdiction and the proceedings were void: *York v. Osgoode*, 24 S. C. R. 282; 21 A. R. 168; 24 O. R. 12; and the fact that the appellant appealed from the award makes no difference. The Referee was wrong in holding that the defendants were not liable because they were acting in an executive capacity and were carrying out the wishes of the owners. The defendants were liable to do the work and there is certain machinery by which repayment of the cost can be obtained: *Hepburn v. Orford*, 19 O. R. 585; *Dagenais v. Trenton*, 24 O. R. 343. The corporation alone can do the work, and doing it negligently are liable: *Stalker v. Dunwich*, 15 O. R. 342. In principle this is like a local improvement and unless there is a remedy against the corporation there is no remedy at all: *Dagenais v. Trenton*, 24 O. R. 343. In *York v. Osgoode*, 24 S. C. R. 282, an injunction was granted against the township. See also *McSorley v. St. John*, 6 S. C. R. 531. The referee had jurisdiction and the plaintiff is entitled either to compensation or damages: *Ellice v. Hiles*, 23 S. C. R. 429; *Sage v. Oxford*, 22 O. R. 678; *New Westminster v. Brighthouse*, 20 S. C. R. 520.

*J. B. Rankin*, for the respondents. This is not like a local improvement work. The engineer is it is true appointed by the corporation but he is then put in action by the ratepayers, and is not the corporation's servant or in a position to impose liability on the corporation. Under the Ditches and Watercourses Act the work may be initiated by any owner and the municipality cannot interfere. The majority system does not obtain. The owner must start the drain on his own land and it must

Argument.

run from it. Under the Municipal Act it may start anywhere and go anywhere. Under the Municipal Act all the land benefited may be assessed. Under the Ditches and Watercourses Act (as in force at the time of the making of this drain) the assessable area is limited and defined: sec. 8, sub-sec. 2. Then under the Ditches and Watercourses Act the assessment is for work and under the local improvement clauses is for money; and under the latter is paid by the municipality. The drain did not pass through the land of five owners. The requisition is no evidence as to the course of the drain. It is signed by all the persons affected but more persons are affected than the owners of land through which the drain runs: see section 6. The plaintiff acquiesced in the work being done and cannot complain: *Gibson v. North Easthope*, 21 A. R. 504; *Gill v. Edouin*, 15 R. 109, at p. 112. The council did no work and never interfered and did not even know about the work. They did nothing but pay the engineer's fees, and are not liable: *O'Byrne v. Campbell*, 15 O. R. 339; *Hepburn v. Orford*, 19 O. R. 585.

*F. E. Hodgins*, in reply.

May 11th, 1897. OSLER, J. A.:—

At the trial it was objected by the plaintiff that the engineer's award and all the proceedings before him were void for want of jurisdiction because the drain passed "through or partly through the lands of more than five owners" in order to obtain an outlet, in which case the requisition to the engineer could not have been filed without the assent in writing of a majority of the owners affected or interested or unless a resolution of the council of the municipality approving of the proposed work had been first passed after those interested had been heard or had had an opportunity of being heard by the council after due notice to them, and there had in fact been no assent in writing or resolution of the council. The learned Referee states that he is unable to find upon the evidence whether the



Judgment.

OSLER,  
J.A.

drain did or did not pass through the lands of more than five owners, but looking at the terms of the award I think that it must be assumed in favour of the plaintiff that it did so, as eight persons are named therein who are ordered to do specified parts of the work and I do not see that these eight persons are not shown to be the owners of as many different parcels of land; and that being the case the absence of jurisdiction in the engineer to make the award would seem to be clearly established. This, however, does not determine the question of the defendants' liability for what was done. The question is whether it can be said that they did it. "On general principles, it is necessary, in order to make a municipal corporation impliedly liable on the maxim *respondeat superior* for the wrongful act or neglect of an officer, that it be shewn that the officer was *its* officer, either generally or as respects the particular wrong complained of, and not an independent public officer; and, also, that the wrong was done by such officer while in the legitimate exercise of some duty of a corporate nature which was devolved on him by law or by the direction or authority of the corporation": Dillon, 4th ed., sec. 974. And again: "If the duty though devolved by law upon an officer elected or appointed by the corporation is not a corporate duty the officers of the corporation performing it do not act for the corporation and hence the corporation, unless expressly declared to be so by statute, are not liable for the omission to perform it or for the manner in which it is performed."

What liability if any the council might assume by passing a resolution under section 6 (b), approving of the proposed scheme or work, it is unnecessary to decide, but I am clearly of opinion, agreeing in this respect, with the learned Referee, that no liability is cast upon them merely in consequence of the action taken by the engineer in assumed compliance with the requisition of an owner. These proceedings are initiated by private persons, not set in motion by or subject to the control of the council or dependent upon any by-law of the municipality. The engineer is an independent officer, appointed, no doubt, by

the council, but appointed in fulfilment of a statutory duty cast upon them, not to carry out the instructions of the council but those of the persons who require the drain to be made. His duties are fixed and prescribed by the statute. The council exercise no judgment, give him no instructions, and have no control over his proceedings. Though he files his award with the township clerk he makes no report of his action to the council, and, unless they happen to be affected by the award as landowners, they are no parties to the award and have no right of appeal therefrom. If the work is not completed as required by the award they do not set the engineer in motion to take the proceedings authorized by section 15 to let contracts for the unfinished sections of the drain. That is done by the engineer at the instance in writing of one or more of the parties interested. The duty of the council is limited to paying the fees and charges or costs awarded by the engineer or the contract price of those parts of the work which may have been let by him and then collecting them in the prescribed manner from those persons who ought to have paid the same or performed the work: secs. 9 (2), 13, 14, 18; 52 Vict. ch. 49, sec. 4. After the drain has been constructed the execution of any work of repair thereon appears to be under the authority and direction of the council: sec. 4, sub-secs. 4 to 9; but they do not stand in relation to the construction of a work of this kind under the Ditches and Watercourses Act in the position occupied by them in carrying out works under the local improvement clauses of the Municipal Act or the Drainage Act. These latter are executed under the direct authority of their by-laws and are done by them and not by those who set them in motion.

The case of *York v. Osgoode*, 21 A. R. 168, 24 S. C. R. 282, which the plaintiff relied upon, is very different from the present. There the action was brought against the township and the engineer to restrain the performance of the work under the invalid award, an award to which the council were parties and which was being enforced by

Judgment.

OSLER,  
J.A.

Judgment.

OSLER,  
J.A.

them or for their benefit. There is nothing in the decision of this Court, or of the Supreme Court affirming it, to countenance the notion that the council would be responsible in damages for the execution of works under such an award as we are dealing with here.

The case of *McSorley v. St. John*, 6 S. C. R. 531, does not help the plaintiff. The judgment of the majority of the Court proceeds on the ground that the officer for whose acts the city corporation was held responsible was not only an officer of the corporation but that these acts—the arrest and imprisonment of the plaintiff—were done in collecting taxes which were received and applied for the benefit of the city and therefore in discharge of a duty imposed by law for the peculiar benefit of the corporation. The dissenting judgment of Ritchie, C. J., states the law applicable to the present case, regarding the engineer as an independent officer. It was contended that the defendants had ratified the illegal action of the engineer by collecting the sums awarded and certified by him to be payable. They might be liable for anything they did in enforcing payment to recoup themselves for what they had paid out, but no further. They certainly did not thereby adopt the drain and become responsible for all its consequences.

It seems needless to say anything as to the effect upon the action of the plaintiff's acquiescence in the proceedings, but I do not wish to intimate any dissatisfaction with the opinion of the learned Referee on that part of the case.

As regards that branch of the claim relating to the alleged refusal of the defendants to allow the plaintiff to drain his land into the 4th concession drain constructed and repaired under by-laws 198, 218 and 347, I also agree with the judgment of the Referee. I do not see what legal cause of action the plaintiff has proved. If he had a right to use that drain the defendants are not shewn to have prevented him from doing so and they did give him leave, on his requesting it, on the condition, which he did not choose to accept, of putting in the tile culvert (they giving him the tiles) at his own expense.

An objection to the Referee's jurisdiction is taken by the reasons of appeal but it was not pressed or asserted on the argument. The order of reference was not appealed from : the case appears to have proceeded before him without protest or objection, and even if, as Drainage Referee, he was not the officer for trial of the first branch of the plaintiff's claim under the Act of 1894, 57 Vict. ch. 56, secs. 88 and 114 (O.), yet as an official referee under section 89 of that Act and 102 of the Judicature Act, I do not see why the case was not properly before him.

The appeal should, I think, be dismissed.

Judgment.

OSLER,  
J.A.

MACLENNAN, J. A. :—

A careful consideration of the whole case since the argument confirms the opinion which I then formed that no case whatever was made out against the defendants ; and therefore the appeal should, in my opinion, be dismissed.

BURTON, C. J. O. :—

I agree.

*Appeal dismissed.*

R. S. C.

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## IN RE TILSONBURGH LAKE ERIE AND PACIFIC RAILWAY COMPANY.

*Trustee—Compensation—Lien—Municipal Debentures—R. S. O. ch. 110, sec. 38.*

A person to whom municipal debentures in aid of a railway company are delivered in trust to be handed over to the company upon the completion of the railway is a trustee within section 38 of R. S. O. ch. 110, and entitled to compensation, and is also entitled to a lien on the debentures until that compensation is paid.

Judgment of ROBERTSON, J., 28 O. R. 106 (*sub nom. In re Ermatinger*) affirmed, but the amount of compensation reduced.

**Statement.** THIS was an appeal by the Imperial Bank of Canada from the judgment of ROBERTSON, J., reported (*sub nomine, In re Ermatinger*) 28 O. R. 106, where the facts and arguments are stated.

The appeal was argued before BURTON, OSLER, and MACLENNAN, JJ. A., on the 28th of January, 1897.

*Laidlaw, Q. C., and J. Bicknell, for the appellants.*

*Moss, Q. C., and D. W. Saunders, for the respondent.*

May 11th, 1897. OSLER, J. A. :—

I am of opinion, agreeing with Mr. Justice Robertson, that Mr. Ermatinger was, in respect of the debentures in question, a trustee within the meaning of section 38 of the Trustee Act, R. S. O. ch. 110. The language of the section is very large: "Any trustee under a deed, settlement or will, any executor or administrator, any guardian appointed by any Court, and any testamentary guardian, or any other trustee, howsoever the trust is created." This is quite wide enough to embrace the case of a person appointed to receive and deposit in safe custody, and on the performance of certain specified conditions to deliver to the persons then entitled, and in default of such performance to return to the depositor, debentures or other described property. If responsibility, taking

care, and pains, and trouble, on the part of the bailee, are involved, I cannot see why he should not be recompensed therefor, or why a special limitation upon the meaning of the word should be inferred so as to take his case out of the statute, when the statute has imposed no limitation, nor used the word in a restricted meaning.

Judgment.

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OSLER,  
J.A.

Therefore, I think Mr. Ermatinger was a trustee, and was entitled to apply to the Court under section 39 of the Act to have an allowance made to him. I think this is not the first occasion on which such an application has been granted under similar circumstances.

Nor do I see that the learned Judge was in error in declaring that the trustee should have a lien on the trust property, or that he should not be ordered to deliver it up until his compensation should be paid to him. That is the position a trustee is by law entitled to occupy in the absence of any controlling circumstances. The cases already decided under the statute, *In re The Commissioners of the Cobourg Town Trust*, 22 Gr. 377; *Re The Toronto Harbour Commissioners*, 28 Gr. 195; *Life Association of Scotland v. Walker*, 24 Gr. 293, seem to be well decided, and to warrant the views I have expressed.

I cannot, however, follow the learned Judge in regard to the compensation allowed. The trustee seems to me to have taken an altogether erroneous view of his duties. What he had to do in general with regard to all the debentures was to receive them, to deposit them in some chartered bank in Ontario, and to deliver them to the railway company, its successors and assigns, upon the completion of the railway to the village of Port Burwell, including the necessary buildings for the accommodation of the passenger and freight traffic thereat; and he had also to return to the treasurer of the municipality issuing the debentures, all (interest) coupons accruing due thereon, prior to the company being entitled to receive the debentures.

It was no part of his duty to inspect the road or to employ engineers to do so, and to satisfy himself by the

Judgment.OSLER,  
J.A.

exercise of his own judgment that the road was completed within the meaning of contracts between the railway company and the townships. That was a matter to be ascertained between the parties themselves, and the depositor's remedy by way of interpleader or other relief was clear and simple, if the parties could not agree upon the fact of the performance of the conditions, and he was threatened with a suit by both or either of them. This was pointed out to him by the bank solicitors as early as the 25th January, 1896. He was told that it was not for him to decide the question of completion; that it was a matter to be fought out between the bank and the townships, and that all that he need do was to deposit the bonds in trust. The letter of the 15th April was an equally clear intimation to the same effect.

The trustee took the opposite, and as it seems to me perfectly untenable view, and insisted upon acting on it. I think it out of question in justice to the bank or whoever may have to pay his allowance, that this wholly officious work and labour performed by him should be treated as an element in considering what it should be. The sum the bank offered—\$250—was, in my opinion, an abundant allowance for the duties which fell to be performed by him, and the order of the learned Judge, who can hardly, I should think, have had his attention called to the terms of the by-law under which the trustee acted, should be varied accordingly.

The action which the bank brought against the trustee was, I am free to concede, in its inception wrongly constituted, but as soon as the townships were added as parties defendants I think the respondent's course was clear, and he should have interpleaded, leaving the real disputants to settle their differences in that way.

It cannot, however, affect the principle on which his allowance is to be estimated; and I must add that I can see no reason why, under our present system, unless it is not to be utilized for the purpose of avoiding costs, the amount of the allowance should not have been determined

in the action which the bank brought against the trustee and the townships. A proper order dealing with the rights of all parties, the trustee's right to and *quantum* of allowance, as well as by whom it should be borne, might then have been made in the action, which now simply exists for the purpose of retaining \$1,000 to meet the trustee's possible claim and the disposition of the costs.

Judgment.

OSLER,  
J.A.

MACLENNAN, J. A. :—

The first question in this appeal is whether Mr. Ermatinger is a trustee. It was contended that he was not, that he was a mere bailee, and that he was not entitled to make the motion which he has made under R. S. O. ch. 110, secs. 38 and 39, to be allowed compensation and to have its amount ascertained.

The several by-laws under which he has acted, after providing that the debentures shall be delivered to him, declare that he shall receive them with the coupons thereto attached upon trust to deposit the same in some chartered bank, and to deliver them to the railway company or its assigns upon the completion of the railway, including the necessary buildings for the accommodation of the passenger and freight traffic. It is also declared that all the coupons accrued due upon the debentures before the company should become entitled to them should be the property of the respective townships and should be returned by Mr. Ermatinger or his successor in office to the respective municipal treasurers.

I think that the by-laws having thus expressly declared that the debentures are to be received in trust for certain purposes, there is no room to argue that he received them otherwise, or that he did not thereby become a trustee in the ordinary sense of the term. He may have been a bailee also within the definitions. Every trustee of chattels is also a bailee when the chattels are in his actual possession. But Mr. Ermatinger was not a mere bailee, with the duty only of keeping the debentures safe without



Judgment. gross negligence: *Giblin v. McMullen*, L. R. 2 P. C. 317 ;  
MAULENNAN, *Coggs v. Bernard*, 1 Sm. L. C., 9th ed., p. 225 ; but he was to  
J.A. deposit them in a chartered bank, until the time arrived for  
delivering them to the railway company, and if he had  
omitted so to do he would have been responsible as for a  
breach of trust.

The railway company were to enter into contracts with the respective municipalities to complete the railway within a limited time, and upon fulfilment of the contracts they were to be entitled to receive the debentures. Mr. Ermatinger, therefore, when he received the debentures became a trustee for both the railway company and the municipalities, and answerable to both for the fulfilment of his duties.

I think it is clear that if, instead of depositing the debentures in the bank, or instead of delivering them or the coupons, as provided by the by-laws, he had converted them or any of them to a use not authorized by the by-laws, he would have been guilty of an indictable offence under section 363 of the Criminal Code, and that having regard to the language of the by-laws under the authority of which he received them, he could not have been heard to say that he was not a trustee.

Then section 38 of R. S. O. ch. 110, gives every trustee such fair and reasonable allowance for his care, pains and trouble, and his time expended in and about the trust estate as may be allowed by the Court, where (section 42) no such allowance is provided for by the instrument creating the trust, and section 39 authorises an application to be made such as the present. I therefore think that Mr. Ermatinger was entitled to apply, as he has done, to have his compensation settled by a judge.

It has been made a question whether he is entitled to a lien on the bonds for whatever compensation he may be entitled to. It is a general principle of equity that a trustee is entitled to indemnity out of the trust property: Lewin on Trusts, 9th ed., p. 714, quoting Lord Eldon: "It flows from the nature of the office, whether expressed in

the instrument or not, that the trust property shall reimburse him all the charges and expenses incurred in the execution of the trust."

Judgment.

MACLENNAN  
J.A.

An allowance for care, pains, trouble, etc., is now given by statute and comes within the same principle, as part of the trustee's charges, and in *Fraser v. Murdoch*, 6 App. Cas. at pp. 872-3, Lord Blackburn lays it down, that a trustee has, no doubt, a right to charge the trust funds with all just allowances; so also in *Life Association of Scotland v. Walker*, 24 Gr. 293.

But besides section 2 of R. S. O. ch. 110 declares that a trustee may reimburse himself out of the trust premises all expenses incurred in the execution of the trusts, so far as not inconsistent with the terms of the instrument. I am, therefore, of opinion, that Mr. Ermatinger had a lien upon the bonds for his compensation. See also Lewin on Trusts, 9th ed., p. 643.

The further question is as to the amount of the compensation which ought to be allowed. The capital sum secured by the bonds was \$45,000, with coupons for interest attached, extending over twenty years, the aggregate amount of such interest amounting to \$28,420; and the learned Judge has allowed a sum of \$750 for compensation.

Now, if the trustee had done no more than to receive the bonds, deposit them in a chartered bank, and then, when the proper time had arrived, had delivered them to the railway company, I think, upon the evidence before us of the compensation usual in such cases, the sum allowed would be excessive. It is necessary, therefore, to examine what care, pains, trouble and time, were bestowed by the trustee upon the subject of the trust. The debentures were received by him in August, 1895, and at about the same time he received notice that the railway company had assigned their right to them to the Imperial Bank.

Upon examining the bonds of three of the townships, the trustee found they did not conform to the by-laws

**Judgment.** under which they purported to be issued, and he notified  
**MAOLENNAN,** the several municipalities of the defects, with the result  
**J.A.** that the debentures and interest coupons were amended and re-executed, and those of one of the townships had to be so amended and re-executed a second time. All this involved a good deal of trouble and correspondence on the part of the trustee.

As already mentioned, the debentures were to be delivered to the railway company or its assigns upon the completion of the railway, including the necessary buildings for the accommodation of the passenger and freight traffic. The further trouble of the trustee arose out of this provision. The bank claimed that the railway was complete within the meaning of the by-laws on the 31st of December, 1895, and shortly after demanded the debentures from the trustee. The townships on the other hand contended that the railway was not complete, and that various works connected therewith were still in an unfinished state, and they forbade the trustee from complying with the bank's demand. These conflicting claims and contentions continued until about the 1st of July, when for the first time the trustee felt that it would be safe to deliver the debentures, and it is evident that from the 1st of January until July the trustee expended much time and trouble, in various ways, in and about the trust. The bank continued to make their demands, but inasmuch as the townships still objected, the trustee firmly resisted, and on the 15th of May, accompanied by an engineer, made a personal examination of the line by walking over its whole length, when he found the ballasting in many places incomplete or altogether wanting.

As late as the 26th of June he was notified by one of the municipalities that the road was still incomplete, and on the same day he was notified by the bank that in default of immediate delivery of the debentures an action would be commenced against him ; and an action was actually commenced against him on the 29th of June, and he was served with the writ on the 3rd of July. Before this

action was commenced the bank were aware that the trustee intended to make another inspection of the road immediately; and he did make such an inspection on the 1st of July, with the assistance of two engineers, who walked over the line with him again, and who prepared and delivered to him their report thereon, on the 2nd of July, to the effect that the road was then complete with the exception of the telegraph line, which had not yet been completed, with the exception of the erection of poles.

Judgment.

MACLENNAN,  
J.A.

The time when the road should be regarded as complete was important in another respect, for the by-laws provided that all coupons which should become due before the company became entitled to the debentures should be the property of the municipality and should be returned to its treasurer by the trustee.

The bank in its correspondence with the trustee and its demands for delivery continually insisted that the road was complete on the 31st of December, 1895, and that they were therefore entitled to all the coupons which matured after that date.

In the correspondence between the bank and the trustee there was a good deal of discussion about compensation, and an offer was made of the payment of \$225 on condition of immediate delivery of the bonds. This was on the 15th of April, but at that time and also in their letter of the 27th of June, they still insisted that they were entitled to delivery without any payment whatever. These are the circumstances in which the trustee found himself in the beginning of July, and on the 17th of that month he filed the present petition. In it he prays not only that his compensation may be ascertained, but also that he may be advised whether the railway is completed within the meaning of the by-laws, and if so, at what date it was so completed. It may be a question whether the advice thus asked was within section 37 of the Act, but, however that may be, that part of the petition was abandoned at the hearing, and the only matter dealt with was that of compensation.

Judgment.

MACLENNAN,  
J.A.

I think it is unfortunate that the bank did not take a more correct view of the petitioner's relation to them and to the municipalities. The business and the questions arising out of it were the business of, and questions between, them and the municipalities.

The railway company and the municipalities had certain business transactions, and this gentleman was requested to assist them by becoming the depositary of the debentures. The bank took the place of the railway company, so far as the right to the debentures was concerned. The by-laws did not authorize the trustee, nor was he requested, to decide the differences between the parties, yet the bank assumed to cast that burden upon him. They were contending that the railway was completed, which the municipalities denied. He might have said to them: "The debentures are safe; they have been deposited in a bank as required; when the proper time for delivery comes, I will deliver them. But you must settle your disputes between yourselves, I decline to be involved in them. It is your business, not mine. When you bring me evidence that the municipalities are satisfied, I will deliver the debentures, on payment of reasonable compensation for my care, pains, trouble and time."

That is the position which he was entitled to take, and the bank would then have had to settle their differences with the municipalities, either by action or mutual agreement. Unfortunately he did not take that position, and the bank, instead of endeavouring themselves to settle with the municipalities, assumed to cast the burden of doing so upon him, and threatened him with action, and did in fact actually bring an action against him.

I think what he did under these embarrassing circumstances is not to be severely criticised, but to be regarded with indulgence, and inasmuch as he appears to have acted in perfect good faith he is not to be blamed for himself taking the trouble of going over the road on two occasions with two engineers to satisfy himself whether it was complete.

In Lewin on Trusts, 9th ed., p. 387, it is said that a trustee cannot be expected to part with the fund unless the right of the *cestui que trust* be undisputed; and that a trustee cannot be expected to incur the least risk, and therefore if the equities be not perfectly clear, he should decline to act without the sanction of the Court, and he will be allowed all costs and expenses incurred by him in an application for that purpose. These statements of the law are supported by numerous authorities. Therefore, when the trustee was threatened with an action by the bank, he might himself have at once brought an action against the bank and the municipalities to obtain the protection of the Court, until the defendants should have settled their differences between themselves.

The bank, however, having brought an action, he could defend himself by setting up the conflicting contentions of those for whom he was acting; and by bringing in the municipalities as parties obtain the protection to which he was entitled in that action. That is what has been done, and it appears that the municipalities when brought before the Court have consented to be barred. An order barring them was made on the 12th of October, and by the same order further proceedings in that action have been stayed pending this appeal. Until that order was made the questions between the bank and the municipalities remained open and undetermined; and then for the first time it became safe for the trustee to deliver the debentures.

The learned Judge has in view of all the time and trouble of the trustee assessed his compensation at the sum of \$750; and the remaining question is whether that sum is, as defined by the statute, fair and reasonable under all the circumstances. The only hesitation I feel about the time and trouble expended by the trustee is his examination of the railway personally with the aid of the engineers employed by him for that purpose; but, upon the whole, I think he may be regarded as having been forced to do those acts by the conduct of the bank.

From the first the bank took the position that it was

Judgment.  
MACLENNAN,  
J.A.

**Judgment.** his duty to decide the question of completion at his peril,  
**MACLENNAN,** and they persisted in that position to the end. That being  
**J.A.** so, I think it does not become them to say that the steps  
which he took for his own safety and protection ought not  
to be remunerated; and I think they must submit to its  
being done. Something was said upon the argument as to  
the sum which has been allowed being greatly in excess  
of what has usually been paid in similar cases for similar  
services; but I do not find that any evidence of that kind  
was brought before the learned Judge, and we are, there-  
fore, obliged to act upon our own judgment of what is  
just and reasonable.

With great respect for the learned Judge I feel bound  
to say that in my opinion the sum fixed by him is too  
large; and I think that \$400 is not only a fair and reason-  
able compensation, but even a large and liberal allowance  
under the circumstances, including therein whatever fees  
the trustee may have paid to the engineers whom he em-  
ployed to assist him.

It was contended that, inasmuch as an action had been  
brought by the bank, this petition was unnecessary, and  
ought not to have been filed; and that the compensation  
might have been settled in the action.

I cannot say, however, that he had no right to file the  
petition. He was the only defendant in the action, and  
although the writ had been served on the 3rd of July he  
could not compel the plaintiffs to proceed with it; and the  
statement of claim was not filed until the 8th of Septem-  
ber, long after the petition had come to a hearing. The  
trustee was entitled to have his compensation ascertained,  
not only against the bank, but against the railway com-  
pany and the municipalities, and these were not parties  
to the action. If the municipalities had been made par-  
ties to the action, then all questions, including the peti-  
tioner's compensation, might have been settled therein;  
but the action having been against the petitioner alone I  
think he was within his rights in resorting to the summary  
remedy prescribed by the statute.

I think that the appeal should be allowed to the extent  
I have indicated, but no farther.

Judgment.  
MACLENNAN,  
J.A.

BURTON, C. J. O.:—

I also think that Mr. Ermatinger was a trustee, and  
entitled to compensation, and I agree with my brother  
MacLennan upon the question of the amount.

*Appeal allowed in part.*

R. S. C.

# ATKIN V. CITY OF HAMILTON.

*Railways—Municipal Corporations—Highways—Damages.*

The plaintiff fell while attempting to cross a railway track which was  
lawfully, and without negligence or undue delay, being built across a  
street in a city:—

*Held*, that neither the railway company nor the city was responsible in  
damages.

*Keachie v. Toronto*, 22 A. R. 351, followed.

Judgment of FALCONBRIDGE, J., 28 O. R. 229, reversed.

THIS was an appeal by the defendants from the judg-  
ment of FALCONBRIDGE, J., reported (*sub nom. Aikin v.*  
*City of Hamilton*), 28 O. R. 229, where the facts are stated,  
and was argued before BURTON, OSLER and MACLENNAN,  
JJ. A., on the 17th and 18th of March, 1897.

*D'Arcy Tate*, for the appellants.

*John Greer*, for the respondent.

May 11th, 1897. BURTON, C. J. O.:—

This is an action to recover damages for injuries sustained  
by the plaintiff, who, in attempting to cross the defendants'  
railway, whilst in course of construction, tripped and fell.

The negligence alleged in the statement of claim is that



**Judgment.** the road bed of the company was negligently and improperly raised several feet above the level of the street, and the sidewalk removed.

**BURTON,**  
**C.J.O.**

The company were authorized under their charter and an order of the railway committee of the Privy Council to construct their railway along and across several streets in the city of Hamilton, including Baillie street where the accident occurred.

The general rule is, that where harm results to any one through the performance of what is authorized by law it is *dumnum absque injuria* where ordinary skill and care are shewn in the performance of the work. There is no evidence to sustain the allegations in the statement of claim that the work was negligently done, and the allegation of delay appears to be equally without foundation, even if the injury of the plaintiff had been attributable to any such cause, which it was not. At the time of the accident there can be no pretence for saying that there had been any delay; the company were pushing the work with all the means at their disposal with the view to securing a bonus granted by the city of Hamilton, which would have been forfeited if the road was not sufficiently completed within the terms of the by-law granting it by the 31st of December.

The judgment is against the city with a judgment over against the railway company under their agreement to indemnify, but this would seem to be erroneous. The city cannot possibly be liable for an act done by others under the authority of an Act of Parliament and an order of the railway committee, which they were powerless to resist. Their liability can arise only on default on their part to keep the road in repair. They have made no default in that respect, and the plaintiff's action against them fails.

But apart from the form of the pleadings and the manner in which the recovery has been had, I have, after a good deal of consideration, come to the conclusion that the learned Judge's judgment against the railway company cannot be sustained. I have already stated that the grounds of negli-

gence alleged in the statement of claim were not proved; but the learned Judge distinguishes this case from *Keuchie v. Toronto*, 22 A. R. 371, lately decided in this Court, on the ground that there was no access to the portion of Baillie street to which the plaintiff was going, except over the railway; and much evidence was given at the trial, and much of the argument before us was devoted to what was alleged to be negligence on the part of the company in not making temporary sidewalks as they had done in more frequented parts of the city. The company may be entitled to credit for taking these additional precautions, but unless there was an obligation upon them to do so it is difficult to understand how the omission to do so can be urged against them as actionable negligence.

Judgment.

BURTON,  
C.J.O.

I do not think there is any evidence to shew any contributory negligence on the part of the plaintiff; she stepped upon some loose broken tiles used as ballasting, which gave way, causing her to fall. It is one of those unfortunate accidents which any one, though not negligent, may be subjected to whilst works of this nature are under construction, but, being authorized by law, there is no remedy in the absence of evidence of want of skill or care in the work. That has not been established, and, much as the accident is to be regretted, I do not think that it would be right to make these defendants liable for the consequences.

I agree therefore with my learned brothers that the appeal must be allowed and the action dismissed, and I suppose with costs if the defendants insist upon them.

OSLER, J. A.:—

It cannot be said that there was a trap at this place. The work was in the condition of being carried on, and the ground just in the state in which it naturally would be under the circumstances.

If the work was lawful, where is the negligence? Was anything being done upon the street in a manner not author-

Judgment.

OSLER,  
J.A.

ized by the by-law of the city, confirmed by the statute of the Legislature, 58 Vict. ch. 68 (O.)? The road was not finished, but the work was being pressed to a conclusion as fast as possible, and having regard to the time when it was begun, there had been no unnecessary delay. In some parts of the city it seems that the railway had put down some conveniences for foot passengers, but were they even bound to do so? And in this outlying part I suppose they thought the necessity for it was not so great. On the argument I was disposed to think this fact bore against them, but on reflection, I think it does not, there being no obligation upon them to put down crossings any more than the city would have been bound to do so, had they been doing the work, or similar work, involving the opening of the street. The only thing they were bound to do was not to leave traps for the unwary—dangerous places unguarded by a warning of their condition. Here everything was patent to the observation of all persons using the road; and if they did use it, they had, I think, to take it as it was, if the work was being done thereon in a lawful manner.

With deference to the learned Judge, there is no real distinction between the present case and that of *Keachie v. Toronto*, 22 A. R. 371, the *ratio decidendi* of which certainly was not that there was a way provided in the middle of the road.

I think the appeal must be allowed.

MACLENNAN, J. A. :—

I am of the same opinion.

*Appeal allowed.*

R. S. C.

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## LEWIS V. MOORE.

*Settlement—Mortgage—Exoneration—Will—Construction—Direction to Sell—Discretion as to Time—Legacy—Discretion as to Time of Payment.*

Certain land, subject with other lands to an overdue mortgage made by the settlor, was conveyed by him to trustees for his daughter by way of settlement to take effect on his death or her marriage. The conveyance to the trustees contained no covenants by the settlor and no reference to the mortgage, which remained unpaid at the time of the settlor's death :—

*Held*, that the mortgage should be paid out of the settlor's general estate. A testator devised all his estate, real and personal, to trustees upon trust so soon after his death as might be expedient to convert into cash so much of his estate as might not then consist of money or first-class mortgage securities, and to invest the proceeds and apply the corpus and income in a specified manner. A later part of the will contained the following provision : "In the sale of my real estate or any portion thereof I also give my said trustees full discretionary power as to the mode, time, terms and conditions of sale, the amount of purchase money to be paid down, the security to be taken for the balance, and the rate of interest to be charged thereon, with full power to withdraw said property from sale and to offer the same for resale from time to time as they may deem best" :—

*Held*, that the later clause merely gave a discretion as to the details and conditions of the sale, and did not qualify or override the specific direction to sell as soon after the testator's death as might be expedient.

The testator gave certain shares of his estate to two sons, the provision for payment being as follows :—"To each of my sons as they arrive at the age of twenty-three years or so soon thereafter as my said trustees shall deem it prudent or advisable so to do, they shall pay over one moiety of his share of the corpus of said estate and the accumulated income on said moiety, if any, and the remaining moiety upon his attaining the age of twenty-seven years, or so soon thereafter as they shall deem it advisable so to do" :—

*Held*, that this direction did not give the trustees an absolute discretion as to the time of payment, but that the general rule, that every person of full age to whom a legacy is given is entitled to payment the moment it becomes vested, applied.

Judgment of ARMOUR, C.J., affirmed.

THIS was an appeal by E. W. Moore and others from Statement the judgment of ARMOUR, C. J.

The plaintiffs were the executors of the will of one Charles Moore, and brought the action to have that will construed, and also to have determined a question as to the liability of the estate to pay the amount of a mortgage upon property settled by the testator in his lifetime upon his daughter, Mrs. Warren.

The action was tried at Toronto, on the 2nd of April, 1896, before ARMOUR, C. J., who on the 4th of April, 1896,

Statement. gave the following judgment, in which the material portions of the will are set out and the other facts are stated.

ARMOUR, C. J. :—

The testator by his will provided that his trustees should, so soon after his death as might be expedient, convert into cash so much of his estate as might not then consist of money or first-class mortgage securities bearing the best rate of interest that might then be obtained and such moneys to invest on first mortgages of farm property in Ontario bearing the best rate of interest that could be obtained ; such interest to be payable not less frequently than half-yearly. And by his said will he also provided that his said trustees in the sale of his real estate or any portion thereof should have full discretionary power as to the mode, time, terms and conditions of sale, the amount of purchase money to be paid down, the security to be taken for the balance, and the rate of interest to be charged thereon, with full power to withdraw said property from sale and to offer the same for resale from time to time as they might deem best.

The discretionary power given by the testator to his trustees as to the time when they should sell his real estate is coupled with the duty to sell it so soon after his death as might be expedient, convert it into cash and invest the cash in first mortgages of farm property in Ontario.

And being a power coupled with a duty is subject to the control of the Court who will compel the trustees to carry it out in a proper manner and within a reasonable time : *Nickisson v. Cockill*, 3 DeG. J. & S. 622 ; *Re Burrage, Burningham v. Burrage*, 62 L. T. N. S. 752 ; *Tempest v. Lord Camoys*, 21 Ch. D. 571. The testator died on the 9th day of August, 1876, nearly twenty years ago and it cannot be said that a reasonable time within which to exercise this power has not long since elapsed and I think that the trustees should proceed at once to sell the real estate.

The fact that the widow of the testator is entitled to dower in it is in my opinion no valid excuse for not proceeding to sell the real estate, for it may be sold subject to her dower, and if a valid excuse it would prevent the sale of the real estate for perhaps another twenty years, the probable continuance of the life of the doweress.

Judgment.

ARMOUR,  
C.J.

And by his will he further provided that to each of his sons as they arrived at the age of twenty-three years, or so soon thereafter as the said trustees should deem it prudent or advisable so to do, they should pay over one moiety of his share of the corpus of the said estate and the accumulated income on said moiety (if any), and the remaining moiety on his attaining the age of twenty-seven years, or so soon thereafter as they should deem it advisable so to do.

The defendant Charles I. Moore, a son of the testator, is now thirty-three years of age, a married man with a family, sober and industrious, employed by the Imperial Lumber Company as a shipper at Warren, has a farm there and the only debt he owes is the sum of \$400 which he borrowed for the purpose of building a dwelling house on this farm and is now certainly entitled to receive his share of the corpus of the estate of the testator if he is ever going to be entitled to receive it under the provisions of the will.

The defendant Charles I. Moore is solely and beneficially entitled to such share and there is no gift of it over in case the trustees should not deem it prudent or advisable to pay it to him, but they hold it solely for him and it may be questionable whether, he being absolutely entitled to this share, his receipt of it could be fettered by any such discretion as is given by the will to the trustees: *In re Johnston, Mills v. Johnston*, [1894] 3 Ch. 204.

But if it could be so fettered I am of the opinion that such discretion is subject to the control of the Court, which has power to see that such discretion is exercised properly and reasonably for otherwise it might happen that the conduct of the trustees might defeat the enjoyment of the gift by the beneficiary altogether.

Judgment.

ARMOUR,  
C.J.

The evidence in my opinion shewed no good reason why the defendant Charles I. Moore should not receive his share of the corpus of the estate of the testator, and shewed that the trustees ought properly and reasonably to deem it prudent and advisable to pay it over to him and I so direct.

The testator was in his life time seized in fee of certain lands known as lots numbers five, seven and nine on Wellington street west, in the city of Toronto, subject to a mortgage thereon for \$12,000 and interest, and being so seized subject to the said mortgage on the 18th day of April, 1876, conveyed the land known as lot number five on Wellington street west, to trustees for his daughter, the defendant Lillias Graham Warren.

And in the month of May, 1876, the testator made his last will and by it provided that whereas he had settled upon his daughter Lillias real estate valued at \$14,000, he desired his trustees to reckon such estate as of such value in determining the whole value of his estate and to charge her share with such sum as already paid to her.

The mortgage for \$12,000 and interest upon said lands was not shewn to me but I assume that it was a mortgage made by the testator himself and contained the usual covenants on his part for the payment of the mortgage money and interest, and on this assumption I base my judgment.

The conveyance of the 18th day of April, 1876, to trustees for his said daughter, was, as I find, a purely voluntary conveyance, containing no covenants whatever on the part of the testator, and the residue of the said mortgaged lands not thereby conveyed passed to the trustees under the will.

And the question for my determination is whether the defendant Lillias Graham Warren is entitled to have the land conveyed to her exonerated by the testator's estate from the said mortgage or whether the land so conveyed to her must contribute to the payment of the mortgage.

I do not think that the question raised in this case is at all affected by the provisions of sections 37 and 38 of the

Wills Act of Ontario, R. S. O. ch. 109, but is to be determined irrespective of that Act.

Judgment.

ARMOUR,  
C.J.

In *Harbert's Case*, 3 Rep. 30, it is said: "For if a man be seized of three acres of land and acknowledges a recognizance or a statute, etc., and enfeoffs A. of one acre, B. of another and the third descends to his heir; in this case, if execution be sued only against the heir, he shall not have contribution, for he comes to the land without consideration, and the heir sits in the seat of his ancestor. *Et haeres est alter ipse, et filius est pars patris*, and as it is said, *mortuus est pater, et quasi non est mortuus, quia reliquit similem sibi*; and therefore the heir shall not have contribution against any purchaser, although *in rei veritate* the purchaser came to the land without any valuable consideration, for the consideration of the purchase is not material in such case."

And again it is said: "The reason why the conuzor himself, at the will of the conuzee, may be only charged, is because he himself is the person who was the debtor and who was bound; and therefore he is subject to execution, and it is but reasonable that he may be only charged; the same law of his heir, for the reasons above rehearsed."

Lord Justice Christian commenting on *Harbert's Case*, in *Ker v. Ker*, [1869] Ir. Rep. 4 Eq. 15, said: "Thus it clearly appears that the reason why the grantor, in respect of his retained lands, was excepted out of the principle of equality which existed between the purchasers from him, irrespective of their priorities, was solely that he was himself the debtor and liable to execution against person and goods." And the conclusions which he gathered from *Harbert's Case* were the following: "First, that the original principle of the Common Law was equality, that is to say, contribution in the ratio of value, wholly irrespective of priority of dates of purchase; second, that the case of the debtor himself and his heir-at-law, in respect of retained lands, was an exception to that principle by reason solely of his personal liability, and that to such exception it mattered not whether the purchasers were such with consideration or



Judgment.

ARMOUR,  
C.J.

without it; third, that when the common encumbrance was *not* a debt of the grantor, but a paramount charge, in respect of which he was under no personal liability, the reason of the exception ceased, the general rule prevailed, and the grantor stood on an equal level with his alienees."

From these cases I draw the conclusion that the mortgage in question being a debt of the testator which he had covenanted to pay and for which he was personally liable, the defendant Lillias Graham Warren is entitled to have the land conveyed to her exonerated from the said mortgage by the testator's estate and that the land so conveyed to her cannot be made to contribute to the payment of it.

The costs of all parties will be out of the estate.

Some of the children of the testator appealed, and the appeal was argued before BURTON, OSLER, and MACLENNAN, JJ. A., on the 29th and 30th of March, 1897.

*McCarthy, Q. C., and W. M. Douglas*, for the appellants. The indenture of the 18th of April, 1876, was a voluntary conveyance, and upon the estate vesting in the grantees they took it charged with the mortgage encumbrance then existing. The terms of the indenture are not enlarged by anything which is contained in the will. Evidence ought not to have been received to shew the value of the estate settled on the daughter Lillias; the \$14,000 mentioned in the will is to be considered as a mere arbitrary sum, and no argument can be founded upon the fact that the property afterwards sold for a smaller amount, and the settled property should bear its full share of the encumbrance existing upon the three lots at the time of the death of the testator: *Ker v. Ker*, Ir. Rep. 4 Eq. 15; *In re Jones, Farrington v. Forrester*, [1893] 2 Ch. 461. The judgment should also be reversed in so far as it orders an immediate sale of the real estate in question. The executors have a discretion, and the circumstances shew that they were justified in not making a sale at present.

They cannot sell at full value because of the outstanding dower, and the present income derived from the property is much greater than any income which can be derived by an investment of the purchase money. It is shewn too that it is a wise discretion not to give the defendant Charles I. Moore any further amount at present on account of his share of the capital; and in any event, there should be a delay in asking a sale until the present temporary depression in real estate has passed over. Argument.

*W. B. Raymond*, for the infant respondent, took the same position.

*Shepley*, Q. C., for the respondents, the executors, submitted to the direction of the Court.

*Moss*, Q. C., for the respondents Mrs. Warren and her trustees. As soon as the property was conveyed to the trustees there was an implied exoneration: *Beavor v. Luck*, L. R. 4 Eq. 537; *Barker v. Eccles*, 17 Gr. 277; *Davis v. White*, 16 Gr. 312. *Harbert's Case*, 3 Rep. 30, is directly in point. That case is explained by Christian, L. J., in *Ker v. Ker*, Ir. Rep. 4 Eq. 15, at p. 28, and the distinction is that here the debtor himself is being called on to pay and cannot set up the doctrine of equality. In *Ker v. Ker*, and in *In re Jones, Farrington v. Forrester*, [1893] 2 Ch. 461, the encumbrances were not created by the grantor, and the contests were between persons not personally liable to pay the debts. *King v. Jones*, 5 Taunt. 418, shews that in the case of a purchaser there need not be any covenant against encumbrances or for further assurance to make the doctrine of implied exoneration of the conveyed parcel take effect.

*Moss*, Q. C., and *H. J. Wright*, for the respondent Charles I. Moore. Upon the true construction of the will and in the events which have happened a reasonable time has elapsed since the death of the testator for the sale by the executors of the real estate; and the discretionary power given by the testator as to the time when they should sell his real estate is coupled with a duty to sell, and is therefore subject to the control of the Court. The evidence

**Argument.** shews that it is reasonable and proper that the trustees should at once proceed to sell the real estate. The evidence also shews that the estate is not being benefited by the delay, and that in fact other portions of the corpus of the estate are being wrongfully and improperly expended in repairs to the buildings upon the real estate in a manner not authorized or justified by the will, and the expense of managing the estate is excessive, and such as to so reduce the income as to leave little or nothing for distribution amongst the parties entitled. All times which are fixed by the testator for payment and distribution amongst his sons of their share of the estate have long since elapsed, and the discretionary power if any vested in the trustees, was limited to the periods mentioned in the will, and after the lapse of those periods they are bound to distribute and pay over the shares of the sons. See the cases cited in the judgment and also *In re Smith, Arnold v. Smith*, [1896] 1 Ch. 171.

*McCarthy*, Q. C., in reply.

May 11th, 1897. The judgment of the Court was delivered by

MACLENNAN, J. A. :—

The first question is what proportion, if any, of the mortgage of the 14th of March, 1871, ought, as between her and her father's estate, to be borne by Mrs. Warren or her trustees. The mortgage was in fee, made by the testator, was for \$12,000 with the usual covenant for payment, and besides the land afterwards settled upon Mrs. Warren comprised another parcel adjacent thereto, on which were erected two warehouses. The settlement upon Mrs. Warren was on the 18th of April, 1876, and at that time the mortgage was overdue.

The settlement is in the form of a conveyance in fee simple to two trustees, reciting the desire of the grantor to make provision for the support and maintenance of his

daughter, Mrs. Warren, then a spinster, in the event of her marriage or of the settlor's death, and his determination for that purpose "to settle the hereinafter mentioned property as hereinafter set out," and in consideration of the premises and of one dollar grants the property to the trustees in fee simple upon certain trusts.

Judgment.  
MACLENNAN.  
J.A.

The deed contains no covenant whatever, nor is there any mention of the mortgage of \$12,000, which was then overdue. The trusts for the benefit of Mrs. Warren were not to arise until her marriage. Until then and during the settlor's life the trust was for his own use and benefit, with power to sell, lease, mortgage or otherwise dispose thereof, as he might from time to time direct, except that in case of sale the proceeds were to be for Mrs. Warren's benefit in any event. In the event of the property not being otherwise disposed of in the life time of the settlor, or before the marriage of Mrs. Warren, which is the event which happened, then the trust was to lease from time to time, and to pay the rents to Mrs. Warren for her separate use for life. The settlement then provided that upon Mrs. Warren's death, leaving issue, the income was to be paid to the issue in equal shares or to their guardians for maintenance until the youngest became of age or married, when the corpus was to be divided between them equally, and if she died without issue or if such issue died before the period of distribution the estate was to be in trust for the settlor, if then living, or if dead, then to be sold and the proceeds to be disposed of as directed by the settlor's will, and for want of direction by will then to the next of kin according to the Statute of Distributions. The trustees were also empowered in their discretion to sell the property and to hold the proceeds upon the same trusts. They were also empowered in case of fire to repair or rebuild with the insurance money, and if that should not be sufficient, to borrow money by mortgage of the property with the consent of the *cestui que trust* and to apply the income from the rebuilt or repaired buildings in and towards the repayment of such mortgage money until it

Judgment. should be fully paid and satisfied. The settlement then  
MACLENNAN, reiterates that until the settlor's death, or his daughter's  
J.A. marriage, the trustees were to exercise no power over the estate except to enable the settlor to control and dispose of it. The only other important provision contained therein is a stipulation that if his daughter married in his life time without his consent she was to have no benefit under it, and the trustees were to reconvey the property to the settlor.

Mrs. Warren was still unmarried when the testator made his will on the 5th of May, a few days after the settlement, and also when he died on the 9th of August, in the same year, and the trusts for her benefit took effect at her father's death.

The will makes no mention of the \$12,000 mortgage, nor is there any mention of his debts or any direction for their payment therein. He directs all his estate, not consisting of money or first-class mortgages, to be converted into cash, and to be invested, and to be divided equally between his wife and children, the wife's share to be in lieu of dower, and to be for life, the shares of the sons also to be for life only with remainder to their issue, and if no issue to the survivors, the shares of the sons to be paid to them, one-half at twenty-three years of age, and the other half at twenty-seven. His widow, three daughters and two sons survived the testator, and are all still living. The only reference to the settlement which the will contains is as follows: "Whereas, I have settled upon my daughter Lillias, real estate valued at \$14,000, I desire my trustees to reckon such estate as of such value in determining the whole value of my estate and to charge her share with such sum as already paid to her."

After the death of the testator his executors paid interest on the mortgage, and, in 1877, \$6,000 of the principal money. On the 22nd of March, 1883, Mrs. Warren's trustees sold the settled property, free from the mortgage, for \$9,500, but as the mortgage still subsisted for \$6,000 the purchaser only paid \$3,500 of his purchase

money and gave a mortgage for \$6,000 to be paid when the old mortgage should be discharged. This was afterwards done by the executors, in pursuance of an agreement made in January, 1894, between the executors and Mrs. Warren's trustees.

Judgment.  
MACLENNAN,  
J.A.

A discharge has been registered, and \$4,000 of the purchase money of the settled property has been paid to a trust company with interest from the date of the testator's death to abide the decision in the present case.

By that agreement it is declared that none of the parties should be prejudiced in any way by the granting of that discharge, and that in determining the question all parties are to be deemed to be, and to be treated as being, in the same position as if the same had not been granted.

The executors and legatees of the testator contend that the settled property is liable to contribute in proportion to value with the other property comprised in the mortgage to its payment, and that is the principal question in the appeal. The learned Chief Justice has decided against that contention, and I am clearly of opinion that his decision is right. The learned Chief Justice relied upon *Harbert's Case*, 3 Rep. 30, and the summary of that case by Lord Justice Christian, in *Ker v. Ker*, Ir. Rep. 4 Eq. 15, and I think those cases bear out his conclusion.

Counsel for the appellants sought to distinguish these cases, and they were both in some respects different from the present. In *Harbert's Case*, the encumbrance was a recognizance, that is, a mere lien or charge upon the land, and the case was the same in *Ker v. Ker*. Moreover, in the last case, the charge was not one created by the settlor, nor was it one for which he was personally liable, but had been created by his brother, who had devised the estate to him subject to debts and annuities charged by the will, which constituted the charge which was in question. In the present case, the encumbrance is a legal mortgage, made by the settlor before the settlement, so that when he made the settlement he had not the legal estate in him, and could not and did not convey it, and only conveyed an equity of redemption.

Judgment. Both *Harbert's Case* and the case in the Irish Court of  
MACLENNAN, Appeal recognize the distinction between the case where  
J.A. the encumbrance is made by the settlor himself, and for which he is personally liable, and where it is made by some previous owner, and is not the settlor's personal debt, and the reason why *Ker v. Ker* was decided as it was, was because the charge was not the settlor's own debt; that is apparent from the observations of the Lord Justice, at pp. 27 and 28 of the report.

In the present case, the mortgage was the settlor's own debt, overdue at the date of the settlement. The settlement makes no mention of it. There is no covenant or agreement concerning it by either party, no evidence that Mrs. Warren or her trustees had any actual notice or knowledge of it beyond the statutory notice by its registration, but which had no effect except to secure its priority in favour of the mortgagee. The settlor might have been sued upon it next day, and might have been compelled to pay it. When he died it became by law a charge in the hands of his executors, not only on the lands comprised in the mortgage itself, but upon all the other property, lands and goods of the testator.

It is clear that regarding it as a debt, neither the testator nor his executors could, in the absence of any agreement, express or implied, bring any action or have any relief of any kind against Mrs. Warren or her trustees, either before or after payment. Nor, on the other hand, by reason of the voluntary character of the settlement, and the absence of covenant or agreement of any kind, could Mrs. Warren or her trustees directly compel the settlor or his representatives to pay the mortgage off, or to relieve the settled land therefrom. Again, neither Mrs. Warren nor her trustees could be sued for or compelled to pay the debt by the mortgagee. They are not debtors to any one. The only debtors are the settlor and his executors. Mrs. Warren and her trustees have the equity of redemption, but they are not debtors.

Mr. McCarthy argued that because the trustees did not

obtain, and have not now, for the purposes of this case, the legal title, it follows that there is a liability to contribution. I think it is clearly otherwise, on well settled principles. It is not disputed that the trustees have the equity of redemption. The meaning of that is, that when the debt is paid by the person who ought to pay it the person entitled to the equity of redemption, is the person who has a right to call for the legal title. Although outstanding in the mortgagee, the legal title is the property of the owner of the equity of redemption, subject to the payment of the debt; and the moment the debt is paid, that is, paid by the person who ought to pay it, the mortgagee becomes at once a trustee of the legal estate for the owner of the equity of redemption. Therefore, if the settlor had paid the mortgage debt immediately or soon after the settlement, either voluntarily or compulsorily, the instant he did so the mortgagee became a trustee for Mrs. Warren's trustees of the legal estate; and if the settlor had claimed and had obtained a conveyance or assignment of the title or the debt or both, it would not have availed him. So far as the debt was concerned it was gone for ever, for he was the only person liable, and he had no legal and equitable claim for reimbursement against any one else. And as regards the legal title, the payment of the debt having made the mortgagee a trustee for the settlement, an assignee from him with notice would be a trustee also. The mortgagee had no more right to make a reconveyance to the settlor than to a stranger. Therefore, if the settlor, having paid the debt, and having obtained a conveyance of the legal title, brought ejectment against Mrs. Warren's trustees, the latter could defend themselves successfully, and could demand and compel a conveyance of the legal title. So also if, the debt remaining unpaid, the mortgagee had brought ejectment or foreclosure against the trustees, they could pay the debt, claim an assignment of it, and sue for and recover the debt from the settlor or his estate; and inasmuch as he himself was the person to pay the debt, and the trustees the owners of the equity of

Judgment.

MACLENNAN,  
J.A.



Judgment. redemption of the parcel in question, he could claim no reconveyance of the legal title of that parcel.  
**MACLENNAN,**  
**J.A.**

A volunteer has exactly the same rights in respect of the estate conveyed to him as a purchaser for value, except so far they have been qualified by statute: *Dickinson v. Burrell*, 35 Beav. at p. 263.

I am, therefore, clearly of opinion that Mrs. Warren and her trustees are not bound to contribute anything towards the payment of the mortgage in question, and that that part of the judgment should be affirmed.

The other question is whether, having regard to the terms of the testator's will, the judgment is right in directing an immediate sale of the estate. The appellants contended that the executors had an absolute discretion as to the time of selling, which the Court could not control. The will, after giving them all his estate, real and personal, expressed the gift to be upon trust, so soon after his death as might be expedient to convert into cash so much of his estate as might not then consist of money or first-class mortgage securities bearing the best rate of interest that might then be obtained; and such moneys to invest on first mortgages of farm property in Ontario, bearing the best rate of interest that could be obtained; such interest to be payable not less frequently than half yearly, and such income to be divided equally among his wife and children.

In a later part of the will, he directs as follows: "In the sale of my real estate or any portion thereof, I also give my said trustees full discretionary power as to the mode, time, terms, and conditions of sale, the amount of purchase money to be paid down, the security to be taken for the balance, and the rate of interest to be charged thereon, with full power to withdraw said property from sale, and to offer the same for resale from time to time as they may deem best."

The contention is that this direction so overrides or qualifies the main direction to sell so soon after death as may be expedient, that they are not obliged to sell even now after the lapse of twenty years unless they think fit,

but may wait for better times. I think the latter clause was not intended to qualify the first at all, but that in respect of time it is plain that all that was intended was to enable the executors to fix the day and hour as well as other details and conditions of the sale, or resale, as the case might be. The general clause itself gives a reasonable degree of discretion as to time for it is to be so soon after death as might be expedient. But one main purpose of the testator was to have his estate converted into money and put into a condition of investment, and another was that the shares of the sons were to be paid in equal parts at the ages of twenty-three and twenty-seven respectively. The sale was intended to be with a view to those objects and to their attainment without unnecessary delay.

Judgment.

MACLENNAN,  
J.A.

As connected with the discretion given to the executors as to the time of selling, it was contended that there was also a discretion to withhold from the testator's sons the payment of their shares for an indefinite period. The provision of the will as to these shares is as follows: "To each of my sons as they arrive at the age of twenty-three years, or so soon thereafter as my said trustees shall deem it prudent or advisable so to do, they shall pay over one moiety of his share of the corpus of said estate and the accumulated income on said moiety if any, and the remaining moiety upon his attaining the age of twenty-seven years or so soon thereafter as they shall deem it advisable so to do." Then follows this provision: "In case any child die leaving no lawful issue him or her surviving, his or her share of said estate shall revert to the survivors, my children and widow, share and share alike and subject to the like rules as to payment as govern the shares herein specifically provided for."

Reading these two clauses together, it is plain that, as regards the two sons, the gift over in case of death leaving no issue must be restricted to death before the arrival of the time of payment, and that whenever a son reached twenty-one he became absolutely entitled to one-half his share, and on reaching twenty-seven the other

**Judgment.** half free from the contingency of death without leaving issue. Now the rule is that every person of full age, to whom a legacy is given is entitled to payment the moment it becomes vested, notwithstanding any direction for postponement, for the reason that from that time it is his own absolute property to do with as he pleases: *Curtis v. Lukin*, 5 Beav. 147; *Saunders v. Vautier*, 4 Beav. 115; and *S. C.* in appeal, 1 Cr. & Ph. 240; and other cases cited in 2 Williams on Executors, 9th ed., p. 1255, and *In re Johnston, Mills v. Johnston*, [1894] 3 Ch. 204. Therefore the son, Charles I. Moore, who is now thirty-two years of age, became entitled to payment of one-half, if not of the whole, of his share at twenty-three and to the other half at the latest at twenty-seven, and the executors had no right to withhold it. Such being his right he became then entitled to require the executors to sell the testator's estate without further delay in order that he might receive his share. The cases cited by the learned Chief Justice in his judgment fully support his conclusion: *Nickisson v. Cockill*, 3 DeG. J. & S. 62; *Tempest v. Lord Camoys*, 21 Ch. D. 571; *Re Burrage, Burningham v. Burrage*, 62 L. T. N. S. 752, and a late case cited by Mr. Moss, *In re Smith, Arnold v. Smith*, [1896] 1 Ch. 171.

I therefore think the judgment right in all points, and that the appeal should be dismissed with costs. Although the executors took no decided part for or against the appeal they had a right to be present, and while we can not give them their costs against any of the parties, we think it reasonable they should have the costs of a formal appearance out of the estate.

*Appeal dismissed.*

R. S. C.

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## IN RE COUNTY OF CARLETON AND CITY OF OTTAWA.

*Municipal Corporations—City Separated from County—Maintenance of Court House and Gaol—Care and Maintenance of Prisoners—55 Vict. ch. 42, secs. 469, 473 (O.).*

No compensation can be awarded by arbitrators to a county municipality in respect of the use by a city separated from that county of the court house and gaol unless the question is specifically referred to them by a by-law of each municipality.

A claim for compensation for the care and maintenance of prisoners stands, as far as the meaning to be given to the word "city" is concerned, upon the same basis as a claim for compensation for the use of the court house and gaol.

The right to, and mode of arriving at the amount of, compensation for the use of the court house and gaol considered.

*York v. Toronto*, 21 C. P. 95, considered.

Judgment of ROSE, J., affirmed.

THIS was an appeal by the county of Carleton from Statement. the judgment of ROSE, J., affirming an award made under the Municipal Act as to the cost of maintaining prisoners, and as to the use by the city of the court house and gaol, and was argued before BURTON, OSLER, and MACLENNAN, JJ.A., on the 18th of March, 1897. A cross-appeal by the city was argued at the same time.

*Chrysler*, Q. C., for the county.

*MacTavish*, Q. C., for the city.

May 11th, 1897. BURTON, C. J. O.:—

During the argument, I was under the impression that the main question in dispute involved a reconsideration of the decision given so far back as 1872, in the case of *York v. Toronto*, 21 C. P. 95.

The point is taken in the reasons of appeal in this way:

(1) That the said award in the said judgment or order referred to was wrong in this, that it did not provide that the respondents should pay to the appellants compensation

Judgment. for the use by the respondents of the court house and  
BURTON, gaol of the appellants, and that the judgment of Mr.  
C.J.O. Justice Rose, now appealed from, should have amended or varied the award so as to provide for compensation being paid by the respondents to the appellants for the use of the said court house and gaol, respectively.

The claim had been disallowed by the arbitrators on the ground that it was covered by decisions already given by the Courts, and the contention is that the learned Judge should either have referred the matter back to the arbitrators with a direction to deal with it, or should have provided for it by amending the award in that respect.

The short answer to that contention is that the compensation in question, if it exists, arises under section 473; whereas the reference to the arbitrators is of the amount to which the county was entitled under section 469.

It is true that the order in council appointing the third arbitrator does refer also to section 473, but that cannot have the effect of enlarging the scope of the reference. The learned Judge was, therefore, right in refusing to interfere with the decision of the arbitrators in that respect.

I scarcely understand the objection as to the arbitrators having exceeded their jurisdiction in fixing a period of five years during which the arrangement should continue. The question related to future expenditures only; the previous agreements were for periods of five years; the other arbitrations contemplated by the Act are for similar periods, and it seems to be a reasonable arrangement and to be free from objection.

I think that no case has been made for our interference with the learned Judge's decision.

With reference to the cross-appeal, it seems to me that the arbitrators have dealt liberally—it may be too liberally—in their award to the county; but the matter was no doubt very fully discussed before the arbitrators, who came to an unanimous conclusion, which has been confirmed by Mr. Justice Rose, and we ought not as an appellate court to interfere.

OSLER, J. A. :—

Judgment.

OSLER,  
J.A.

The principal ground of appeal is that the arbitrators rejected the claim of the county under section 473 (1) for the use by the city of the county court house and gaol. In their award they say that they "are of opinion that such claim should be disallowed under the decisions heretofore given on that point." The decisions alluded to doubtless are *York v. Toronto*, 21 C. P. 95; followed by the present Chancellor in 1893, in the case of *Re Kent and Chatham*, not reported. The point thus raised, if properly before us, would seem to present for reconsideration the question decided in those cases and the proper construction and meaning of section 473 (1), and other allied sections of the Municipal Act. I doubt, however, if we are in a position to determine the question and to correct the award if we should think the arbitrators wrong. They have practically declined to entertain the claim, though they might have given a better reason than they did for not doing so; namely that it was not within the scope of the reference. Such a reference is constituted by a by-law of each municipality appointing an arbitrator on its behalf, and these two are then in writing to appoint a third arbitrator. If they fail to do so within the prescribed time the Lieutenant-Governor in Council may on the application of either of the parties interested appoint such third arbitrator: Municipal Act, secs. 385, 389.

The subject of the reference should be, as in the present case it is, defined by the by-laws of the councils entering upon the reference.

The by-law of the county of Carleton, passed on the 13th June, 1896, appointed Judge Deacon, the Senior Judge of the County Court of Renfrew county, arbitrator on their behalf "in determining under the provisions of the Municipal Act the proportion of the expenses of repairing and maintaining the court house and gaol and the proper lighting, cleansing and heating thereof, and of providing all necessary accommodation and other things therein and

**Judgment.** of all other charges relating to criminal justice payable respectively by the corporation of the county of Carleton and the corporation of the city of Ottawa.”  
**OSLER,**  
**J.A.**

These are claims arising under section 469 (1) of the Municipal Act alone, and have no relation whatever to demands which the county might make under section 473 (1), (2).

Notice of the passing of this by-law was given by the county clerk to the mayor of Ottawa. The terms of the notice are remarkable. The substance of the county by-law defining the terms of the reference are truly set out, but the clerk adds thereto “and also for determining the compensation to be paid for the use of the gaol and for the care and maintenance of prisoners therein,” these latter claims being the subjects dealt with by section 473.

The corporation of the city having apparently had more accurate information of the terms of the county by-law than the county clerk had supplied them with, then passed their own by-law reciting that disputes had arisen between the corporation of the county of Carleton and the corporation of the city of Ottawa in reference to the amount of the compensation to which the corporation of the county was entitled under section 469 of the Municipal Act; and appointing Taylor McVeity, of the city of Ottawa, barrister-at-law, arbitrator on behalf of the corporation of the city to determine the amount of the compensation to be paid to the corporation of the county, pursuant to the provisions of the Consolidated Municipal Act, 1892, in that behalf.

The reference therefore agreed to by the city is of the same matters in dispute as those specified in the county by-law, or is at all events confined to matters arising under section 469.

The arbitrators having failed to appoint a third arbitrator, the county of Carleton applied to the Lieutenant-Governor in Council to appoint him, and the Judge of the County Court of the county of Kent was appointed by order in council of the 4th of September, 1896. The attention of

the Lieutenant-Governor could not have been called to the terms of the by-laws, for the order purports to appoint a third arbitrator to act with the other two, "in the arbitration between the said corporations for the adjustment of the charges and expenses and other matters mentioned in sections 469 and 473 of the Consolidated Municipal Act, 1892, to be borne by the corporation of Ottawa."

It was, of course, impossible for the Lieutenant-Governor in Council to enlarge the scope of the reference by any misdescription of its terms, any more than the two arbitrators themselves could have done so had they concurred in an appointment of the third arbitrator.

Therefore, no claim for the use of the court house and gaol or for the care and maintenance of prisoners was regularly before the arbitrators, and they could not if objected to (as it was as regards the former) have made any valid award in respect thereof, even if upon the true construction of section 473 the county might have a valid claim to compensation for such user.

Upon this ground, therefore, it appears to me that the judgment (no reasons for which are reported) cannot be interfered with as to the claim set up under section 473. As regards the care and maintenance of prisoners, the parties do not complain of the award, and I presume may be taken to have accepted it.

I have not, I confess, in the examination I have given to the question been able to understand how that claim stands on any different footing from the claim for compensation for the use of the court house "*and gaol*," as regards the meaning to be given to the word "city." It is the same city—a city of the same kind, which has to make this compensation and to pay for the maintenance of prisoners, and no such thing as a city separated from the county for judicial purposes has been known to the law since Toronto was re-united to York by 32 Vict. ch. 6, sec. 22; C. S. U. C. ch. 3, sec. 4; R. S. O., 1877, ch. 5, sec. 6; R. S. O., 1887, ch. 5, sec. 6. This, however, is by no means to say that there can be any substantial claim for

Judgment.

OSLER,  
J.A.



Judgment.

OSLER,  
J.A.

the use of a court house erected before 1873, Municipal Act, 1873, 36 Vict. ch. 48, sec. 363 ; Consolidated Municipal Act 1892, sec. 469 (1), unless possibly city courts such as police courts, etc., are held therein. I do not wish to be understood as agreeing with the contention of the county that their claim to compensation for the use of such a court house can be determined upon the basis established by section 473 (2), for arriving at the compensation to be allowed for the care and maintenance of prisoners, which in the case of a gaol erected since the year 1873, to the cost of the erection, repair and maintenance of which the city is bound to contribute its just proportion, might well be held to cover any possible claim for its user by the city. The same observation applies to the case of gaols erected before 1873. I do not know how these can be held to be outside section 473 (2), and if the arbitrators deem it just and reasonable to take into consideration the cost of the site, etc., and other elements referred to therein (always bearing in mind that the controlling element must as it seems to me be the number of prisoners sent up by the city authorities (section 454), and perhaps, though this is very doubtful, for offences committed in the city), the user of the gaol must be substantially compensated thereby. The user of the court house is something very different from that of the gaol, and speaking still of court houses erected before 1873, the Legislature, notwithstanding the decision in *York v. Toronto*, 21 C.P. 95, have made no provision for ascertaining how in the case of cities not judicially separated from their counties they can be said to make any user of them *quâ* city, other than as they may happen to do so by holding some city court therein.

I can see nothing in the Act which would warrant the arbitrators in making a charge for user based upon cost of site, erection of buildings, and so on. The Municipal Act of 1873, sec. 363, already referred to, and the amendment of 1880—secs. 469 and 472 of the Consolidated Municipal Act 1892—provided for future cases, in which there seems no room to put forward a claim for user by the city of a

building to which, though the property of the county, the city contributes its just proportion of the cost of erection, maintenance and repairs as well as of its equipment.

Judgment.  
OSLER,  
J.A.

Another objection to the award is that the arbitrators allowed nothing to the county for the city's share of expenditure for repairs or additions to the gaol and court-house in 1890 and 1894. These claims were, I think, outside of the reference. They were provided for by the agreement of the 1st April, 1886, and the arrangement made between the city and county in 1891.

The quinquennial arrangement contemplated by the statute between city and county seems to be as respecting such matters as are referred to in section 473, but the parties have evidently dealt with the reference before the arbitrators on the footing that they were to provide for all the matters mentioned in the award, including those arising under section 469, for the term specified therein. At all events I do not understand that the award is moved against on the ground that it is invalid in this respect.

The appeal must therefore be dismissed with costs. I thought the cross-appeal, which refers to some very trifling matters, was hardly pressed. I see no reason why it should not share the same fate.

MACLENNAN, J. A. :—

I am of the same opinion.

*Appeal and cross-appeal dismissed.*

R.S.C.

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## IN RE STONEHOUSE AND PLYMPTON.

*Drainage—Improvement of Old Drain—Drain Extending into Adjoining Municipality—57 Vict. ch. 56, sec. 75 (O.).*

Under section 75 of 57 Vict. ch. 56 (O.), a township municipality which has constructed a drain within its own boundaries, connecting however with a drain constructed as an independent work by an adjoining municipality, has power, without the petition of the ratepayers, to provide for the necessary repairs to both drains, and to assess the adjoining municipality with its proportion of the cost. Judgment of STREET, J., reversed.

**Statement.** THIS was an appeal by the township of Plympton from the judgment of STREET, J., reported 27 O. R. 541.

The following statement of the facts is taken from the judgment of OSLER, J. A.:—

This is an appeal by the defendants from the judgment of Street, J., quashing with costs their by-law No. 3 of 1895, entitled (in part) a by-law to provide for the repairing and deepening throughout of what is known as the Stonehouse drain, in the townships of Plympton, Enniskillen and the village of Wyoming—finally passed on the 17th of August, 1895.

The ground on which the by-law was quashed appears to have been that the engineer had based his examination and report upon the assumption that the drain in question, which passed through parts of three different municipalities, had been originally constructed as a single work, whereas it consisted of two independent drains constructed at different times and for different purposes under by-laws of the two township municipalities, and the ratepayers affected were entitled to have the engineer's judgment upon the true state of facts, as was also the council when acting on the report.

The by-law in question recites that notice has been served on the council by a resident ratepayer of the township affected by the drain, that "the Stonehouse drain" is out of repair, and requiring the same to be repaired; that in order to carry off the water originally designed to be carried off thereby, and to prevent damage to adjacent

## Statement

lands, it has become necessary to repair, deepen and widen the drain ; that the council thereupon procured an examination to be made by Jones, P. L. S., of the drain, and plans, etc., and estimates of the work, and of the lands and roads to be benefited by the repairing, deepening and widening, etc., and of other lands liable to contribution, to be prepared, stating the proportion of benefit, outlet liability and injuring liability which would be derived or incurred by the work, his assessment therefor being as set forth in the by-law ; and then the report is set forth. The engineer states therein that he has made a survey and examination of the "Stonehouse drain" in the first concession of Plympton, from the village of Wyoming to the township of Enniskillen ; that he had also found it necessary to continue his survey and examination down the said "Stonehouse drain" into the township of Enniskillen to the south end of the west half of lot 11, in the 13th concession (Enniskillen) ; that he had made an examination of the whole territory drained by "the said Stonehouse drain," and had found it very much out of repair "throughout both the said townships of Plympton and Enniskillen, and insufficient to carry off the water it was originally designed to carry off." In order, therefore, to make the said drain efficient and prevent damage to adjacent lands, he reported and recommended that "the said Stonehouse drain be repaired, deepened, and widened throughout from the outlet at the south end of the west half of lot 11 in the 13th concession of Enniskillen, north-easterly to the boundary line of the village of Wyoming."

He finds that the proposed improvement will benefit and afford better outlet for certain lands or roads in Enniskillen and Plympton, and also in Wyoming. Then the specifications for the work are set forth.

The total cost of the work is reported to be . . \$3,657

The cost of excavation and damages in Ennis-

killen . . . . . \$2,245

And in Plympton . . . . . 1,412

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\$3,657

Statement. Apportioned thus between the municipalities affected and interested :

The village of Wyoming.....	\$849
The township of Enniskillen .....	540
And the township of Plympton .....	2,268
	<hr/>
	\$3,657

Plympton, for whose benefit and at whose instance the work was immediately done, and who gets the benefit of the improved outlet, thus bearing the greatest proportion of the cost.

There was no petition for the work by the ratepayers interested; the engineer acted entirely upon the instructions of the council, who were set in motion on the complaint of a ratepayer of Plympton, that his lands were suffering damage by reason of the drain being out of repair.

These instructions referred to the Plympton drain and directed the engineer to take the necessary steps to have it repaired "and the outlet improved."

In September, 1895, Enniskillen passed a by-law to raise and pay over to Plympton \$540, their proportion of the cost of the work, the lion's share of which is imposed upon the plaintiff's property, though it consists in part of damages payable to him, arising out of the construction of the work, which form part of the total cost as ascertained by the principal by-law: sec. 9, sub-sec. 5. In the same month this motion was launched.

It is quite clear upon the evidence that the drain reported on by the engineer, which he recommends to be repaired, deepened and widened throughout, was not constructed as a single work. That part of it which is in Enniskillen was constructed by that township in 1870, under by-law No. 13, on the 25th of April, 1870, and was widened, deepened and straightened in 1875, under the authority of another by-law. It was simply a township work not done by local assessment.

It commenced at a point on the side line, between lots 15 and 16, 120 rods south of the townline, between Plympton

and Enniskillen and continued in a general south-westerly direction to its outlet in Bear river. Statement.

The drain in Plympton was constructed by that township under a local assessment by-law passed on the 1st of August, 1873, on petition, for draining certain lots in the first and second concessions. This drain extended from the north side of the townline between Plympton and Enniskillen, a little west of the side line between lots 15 and 16 in the 14th concession of Enniskillen, in a northerly or north-easterly direction in the first and second concessions of Plympton. Subsequently, it is not clearly shewn when, but probably in the end of 1873 or in 1874, the two drains were united, it is said by the township of Plympton, but at all events ever since that time they have formed a continuous drain, Enniskillen apparently repairing the water gates and bridge.

In March, 1876, Plympton passed a by-law, No. 245, recognizing the justice of contributing part of the cost of the construction of the Enniskillen drain and assessing a sum of \$236.75 as ascertained by the report of the engineer of that township upon certain lands in Plympton "for the purpose of straightening, deepening and cleaning out said ditch as it extends into the township of Plympton."

There was evidence that the two drains followed in great part of their course, and in particular just at and above and below their junction, a natural creek known as the Stonehouse creek; and the evidence of the engineer and others went to prove that the natural outlet, or only available, or best outlet, for the water coming down from Plympton through the Plympton drain was the Enniskillen drain; that it was impracticable to take these waters to any other outlet, though this was denied, and there was some evidence to the contrary. The engineer also swore that all his instructions had regard to the drain in Plympton, and that everything he did was done with regard to having its repair properly and efficiently done for the purpose of conveying away the waters it was originally designed to carry off.

**Argument.** The appeal was argued before BURTON, OSLER, and MACLENNAN, JJ.A., on the 20th and 21st of January, 1897.

*Shepley, Q. C.*, and *Cowan*, for the appellants. Under section 75 of 57 Vict. ch. 56 (O.), there was full power to take the proceedings in question. The appellants were bound to keep the drain in order, and to do so had the right to cause work to be done in the adjoining municipality. There was no misconception by the engineer of his duties or powers, and the fact that the whole history of the drain is not stated upon the face of his report is of no importance.

*Aylesworth, Q. C.*, and *Shannessy*, for the respondent. There was no proper investigation or report here, and nothing to found jurisdiction under section 75. The engineer has evidently been acting under a mistaken view as to the nature of the drain in question, and has not exercised proper judicial discretion: see *In re Anderdon and Colchester North*, 21 O. R. 476; *Beckett v. Johnston*, 32 C. P. 301; *Re Jenkins and Enniskillen*, 25 O. R. 399; *In re Romney and Tilbury West*, 18 A. R. 477; *In re Orford and Howard*, 18 A. R. 496; *Stephen v. McGilivray*, 18 A. R. 516.

*Shepley, Q.C.*, in reply.

May 11th, 1897. The judgment of the Court was delivered by

OSLER, J. A.:—

The broad question is whether the township of Plympton had authority to pass the by-law without the petition required by section 3 of the Act.

It is the fact that the Enniskillen drain had become the outlet for the Plympton drain, and apparently with the assent of the former township, if that is material.

The section relied upon in support of the jurisdiction of Plympton and its engineer is section 75. Does that section

justify the report and by-law, assuming that the engineer and council rightly apprehended that these drains were separate and distinct in their origin, and that the engineer's instructions related to the Plympton drain ?

**Judgment.**

**OSLER,  
J.A.**

The section enacts, (omitting such parts of it as cannot have any application to this work), that whenever for the better maintenance—i.e., preservation and keeping in repair—of any drainage work—such as the Plympton drain was—or to prevent damage to lands or roads—as in the present case—it shall be deemed expedient to (1) change the course of the drain—which was not desired—or (2) make a new outlet for the whole or any part of the work—and this was not needed, the Enniskillen drain being the existing outlet—or (3) otherwise improve, extend, or alter the work—which is what was aimed at—the council of the municipality whose duty it is to maintain the drainage work—and this was the duty of Plympton under section 68 of the Act—may, without the petition required by section 3 of the Act, but on the report of an engineer appointed by them to examine and report on the same, undertake and complete the improvement, extension or alteration specified in the report, and the engineer shall for such improvement, extension or alteration have all the powers to assess and charge lands and roads in any way liable to assessment under this Act for the expense thereof in the same manner, and to the same extent, by the same proceedings and subject to the same rights of appeal as are provided with regard to any drainage work constructed under the provisions of the Act.

It seems clear, therefore, that for whatever the engineer may undertake or do under this section he may invoke all the powers which he has in regard to the original construction of a drainage work. If he had found it necessary he might have reported in favour of a new outlet or an extension of the drain into another municipality. What he had to do was to examine and report upon the Plympton drain, what repairs were needed, and how they could best be carried out. He found that it would be necessary



Judgment.

OSLER,  
J.A.

to deepen and straighten it and that this could not be effectually or usefully done without improving its existing outlet, the Enniskillen drain. Had he authority to report in favour of that course being adopted? I am of opinion that he had.

When a drain is to be constructed upon petition, section 59 enables the engineer, "when it is required to continue any drainage work" beyond the limits of the initiating municipality, to continue his survey and levels into or through any other municipality until he reaches a sufficient outlet, i.e., the safe discharge of water at a point where it will do no injury to lands or roads, and in every such case he may assess and charge, regardless of municipal boundaries, all lands and roads to be affected by benefit, outlet or relief, with such proportion of the cost of the work as to him may seem just, estimating separately in his report the cost of the work within each municipality and upon the road allowances. This section, therefore, seems entirely appropriate to the case the engineer was dealing with, the powers thereby conferred upon him when reporting upon a drain to be constructed on petition being imported into section 75, under which he was acting: section 3, sub-sections (3) and (4), may also be referred to.

It was strongly contended by Mr. Aylesworth, that the powers of the engineer and the municipality of Plympton were strictly confined by section 68 to the making of repairs within that municipality, the drain being one not continued into any other municipality, and therefore maintainable by and at the expense of the municipality which constructed it. I concede that the drain was not one continued into any other municipality within the meaning of that section, but nevertheless it appears to me that section 75 provides for different circumstances, and does enable the township which has constructed a drain strictly within its own boundaries to go outside of them when for the purpose of reparation or other purposes mentioned in section 75 it becomes necessary to do so, just as it might have done under similar circumstances when constructing the drain in the first instance.

Then, with regard to the special ground on which Street, J., quashed the by-law:—If the council had, as I have shewn, jurisdiction to pass it, assuming that the Plympton drain was in its origin and in point of law a drain separate from the Enniskillen drain, I cannot agree in holding that the by-law is bad merely because in some parts of the report, and in the by-law itself, expressions may be found treating the drain in both townships as a single drain, and not, as in fact it was, two independent drains flowing one into the other.

Judgment.

OSLER,  
J.A.

I think we may look at the evidence to ascertain whether there is any probability of the engineer or the council having been misled as to this. If we could see that this was the case, and that injustice had resulted to the plaintiff therefrom, it would be right to interfere, because it would seem that, though the township might, the plaintiff could not, appeal from the report on this ground.

After a careful examination of the evidence, however, I have failed to find anything to shew that the township and the engineer were misled, or that they were not entirely familiar with the origin of their drain. It is true the engineer speaks of the work in one part of his report as one drain, referring to its course, but that seems only to be in reference to the fact that it had as a drain become one. There is nothing to indicate that his work of examination and assessment, or the report, proceeded upon a misconception of the facts, but the contrary.

His work appears to have been carefully done, and though faults, it is said, may be found in the various items of assessment, I think there is nothing which cannot be corrected by appeal to the Court of Revision, or which forms any ground for setting aside the by-law.

I have not referred to the order which the engineer obtained from the referee purporting to confer upon him authority to assess lands in Enniskillen, because section 72, under the supposed authority of which the order was made, appears to me not to apply to the case. The case the latter part of the section provides for is that of one

Judgment.

OSLER,  
J.A.

municipality assessing, for repairs done within its own borders upon a drain it is liable to maintain, lands of another municipality into which water flows from the municipality undertaking the repairs. It does not deal with the larger subject provided for by section 75.

So far as I have been able to comprehend the new or amended provisions of the Drainage Act of 1894, in their relation to the facts of the present case, I am of opinion that the appeal must be allowed.

*Appeal allowed.*

R. S. C.

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### HOOVER V. WILSON.

*Executors and Administrators—Accounts—Commission.*

An executor who discharges his duty honestly but owing to want of business training keeps his accounts loosely and inaccurately is entitled to compensation for his care, pains and trouble, but the amount of compensation should not, in such a case, be relatively large.

Compensation when allowed should be credited to the executor at the end of each year.

Judgment of ROSE, J., reversed.

**Statement.** THIS was an appeal by the defendant from the judgment of ROSE, J.

The action was brought for an account of (among other claims) the defendant's dealings as executor and trustee of one Hoover, and was referred to the Master at St. Catharines. He took the accounts and refused to allow the defendant any compensation for his services, and his report was upheld by ROSE, J.

The defendant appealed and the appeal was argued before BURTON, OSLER, and MACLENNAN, J.J.A., on the 30th and 31st of March, 1897.

*Moss, Q.C., and J. C. Rykert, for the appellant.*

*H. H. Collier, for the respondent.*

Upon the question of the right to compensation the following cases were cited: *Inglis v. Beaty*, 2 A. R. 453; *Simpson v. Horne*, 28 Gr. 1; *In re Honsberger, Honsberger v. Kratz*, 10 O. R. 521; *In re the Commissioners of the Cobourg Town Trust*, 22 Gr. 377. Argument.

May 11th, 1897. The judgment of the Court was delivered by

MACLENNAN, J. A. :—

[The learned Judge stated the facts and dealt with the items in question and continued:]

The remaining question is with regard to commission, or compensation to the defendant for his care, pains and trouble. The statute, R. S. O. ch. 110, sec. 38, enacts that an executor or guardian shall be entitled to such fair and reasonable allowance for his care, pains and trouble and his time expended in and about the trust estate as may be allowed by the Court or Judge or Master. The effect of that is that an executor or guardian now discharges his duty on terms of compensation, instead of gratuitously as formerly, when there is no express provision to the contrary in the instrument of his appointment. The measure of the compensation is what is fair and reasonable for the care, pains, and trouble and time expended. The Master has disallowed the defendant's claim for compensation. There is no doubt whatever that the defendant did expend care, pains, trouble and time about this estate. He was a man well-known to the testator, he had been the testator's agent for seven years before his death, and the degree of his fitness for the duty he requested him to undertake must have been known to him. The service was intended to continue, and did continue for nine years. He was not a man of education or acquaintance with accounts, and had a business of his own to attend to. The business was done, and the accounts were kept loosely, but his books shew that the estate accounts were no worse

Judgment. kept than the accounts of his own business. He intended to act carefully, and with pains, and his accounts shew that he did act with a rude sort of care and pains, and with much trouble and expenditure of time. It has not been found, and I see no evidence, that he intended to act dishonestly. The suggestion that the entries in his books shew an intention to defraud the estate by a pretended settlement and balance of accounts at the time of the testator's death does not impress me. I think, having regard to his imperfect acquaintance with accounts, that he might himself well have believed that his account with the testator was balanced. Unless he did he strangely preserved on the face of his books the clearest evidence of his own fraud.

MACLENNAN,  
J.A.

It is a strong proof of his intention to act honestly and to the best of his ability that he from the first adopted a system of pass books for the inspection of the family, which it is admitted they had the opportunity of inspecting and examining as much as they pleased. These pass books in the main agree with his office books and the items therein have been found correct in the main, and have been allowed. The account has now been taken against him with great strictness. He has been charged with interest and with annual rests. Large sums which he claims to have paid, and swears he paid, and which perhaps he did pay, have been disallowed. Under these circumstances I do not think it a case in which compensation should have been disallowed. If an executor or trustee takes no care or pains whatever or so little that the trust estate has received no benefit, or if the care and pains have been used and applied not for the advantage of the trust but dishonestly and for the trustee's own benefit, then there may be a proper case for disallowance. But I think this is not such a case. The further question is what compensation the defendant ought to receive. The statute says it is to be fair and reasonable. I think it ought to be measured to some extent by results. I think the defendant's care and pains were not of a high quality, and the

results were poor, and I therefore think that fifty dollars a year is a fair and reasonable sum to allow. The practice has been, and having regard to the purpose for which the allowance is made it must be the proper practice, to allow it year by year in the accounts; therefore the defendant should be allowed a sum of fifty dollars at the end of each year in the restatement of the account which should now be made.

Judgment.

MACLENNAN,  
J.A.*Appeal allowed.*

R. S. C.

## BICKNELL V. PETERSON.

*Patent of Invention—New Application of Old Mechanical Device.*

The application to a new purpose of an old mechanical device is patentable when the new application lies so much out of the track of the former use as not naturally to suggest itself to a person turning his mind to the subject, but requires thought and study.

The application to an oil pump of the principle of "rolling contact" was held patentable.

Judgment of FALCONBRIDGE, J., reversed.

THIS was an appeal by the plaintiff from the judgment of FALCONBRIDGE, J. Statement.

The action was brought to restrain the infringement of a patent for an oil pump, and the nature of the invention, and the other facts, are set out in the judgment.

FALCONBRIDGE, J., dismissed the action, and the plaintiff's appeal was argued before BURTON, OSLER and MACLENNAN, JJ. A., on the 18th and 19th of January, 1897.

*Aylesworth*, Q. C., and *A. E. Shaunessy*, for the appellant.

*J. G. Ridout*, for the respondent.

The following authorities on the question of patentability were referred to: *Dowling v. Billington*, 7 Rep. Pat. Cas. 191; *Harwood v. Great Northern R. W. Co.*, 11

**Argument.** H. L. C. 654; *Penn v. Bibby*, L. R. 2 Ch. 127; *Washburn v. Haish*, 4 Fed. Rep. 900; *Taylor v. Brandon Manufacturing Company*, 21 A. R. 361; *Tweedale v. Ashworth*, 9 Rep. Pat. Cas. 121; *Miller v. Clyde Bridge Steel Company*, 9 Rep. Pat. Cas. 470; *Ridout on Patents*, pp. 35, 36, 123, 124.

May 11th, 1897. The judgment of the Court was delivered by

MACLENNAN, J. A :—

I think the only serious question in this case is whether the alleged invention of the plaintiff is patentable. If it is, the infringement by the defendant is clearly proved. The bearings made by the defendants are plainly colourable imitations of the plaintiff's contrivance, and I think inferior for the purpose intended. In the oil producing districts there are many thousands of wells and in the neighbourhood of Petrolea alone there are said to be from 5,000 to 8,000. The oil is obtained from them by means of pumps, weighing from 1,200 to 3,000 pounds apiece. The pumps are worked in gangs, from fifty to sixty pumps on an average being worked by a single engine. Each pump is worked by an arm or beam of wood oscillating upon the head of a post for a fulcrum. It is a case of a lever and fulcrum. Now it is evident that any contrivance which diminishes or destroys friction in the lifting of these very heavy pumps must proportionally reduce the power required for that purpose, and consequently the expense of working and must be a great desideratum, and therefore of great commercial value. Before the plaintiff's invention there had been in use as the best known contrivance a patent known as Barrett's. That consisted of a hollow semi-cylinder about six inches long affixed with its hollow surface uppermost to the post, and a solid semi-cylinder with its flat surface affixed to the beam. These were so arranged that the solid cylinder fitted into the hollow one, and revolved back and

forth therein with each stroke of the pump. The hollow cylinder was closed at both ends in order to keep the beam in place laterally. The hollow cylinder was constructed with a cup-like opening at the side to admit of oil being introduced, there being also depressions within to give a certain amount of space for the oil. In the specimen of this contrivance produced in evidence, each of the surfaces of metal in actual frictional contact is about eight square inches. It is easy to see how great the friction between these metal surfaces must be when rubbing against each other under a pressure of from 1,200 to 3,000 pounds, and how desirable it was to do away with it. This contrivance had also another defect, which caused frequent stoppages and delays. The pumps are worked in the open air, and rain, snow and dust found their way into the bearings, clogged their working, and necessitated constant attendance for cleaning and lubrication. Until the plaintiff's invention no plan had occurred to any one of overcoming these objections to the Barrett contrivance. In doing that the plaintiff's invention is a perfect success. Friction is almost completely avoided, lubrication is unnecessary, and there is no longer any clogging by snow, ice or dust. The surfaces of the bearing are both convex, so that the upper one rolls or rocks upon the lower one instead of rubbing, and is kept in place by a lug or lugs projecting therefrom and let into a slot or slots in the lower one made of a shape and size to admit of the necessary rocking motion of the beam. It is evident that the curved or cylindrical form of the upper surface of the lower plate reduces to a minimum the lodgment of snow or of rain and consequently of ice or dust.

It is contended, however, that the invention is not patentable, and that it has been anticipated, and my learned brother Falconbridge has so decided. With great respect I am unable to concur in that opinion. That the contrivance is a great improvement upon that which was previously in general use for the same purpose is obvious, and it is evident that it is of great commercial value. But it is

Judgment.  
MACLENNAN,  
J.A.



Judgment. said to be merely a new application of an old and well-known thing. A blacksmith's bellows lever, a child's teeter working on a peg, the rocker of a chair or cradle, and rocking movements for weigh scales and other things, have been cited as instances of similar contrivances and anticipations of this invention. And these are, no doubt, all instances of rolling contact. But in none of these cases was the object sought to be obtained the avoidance of friction. The rocking motion was all that in these cases was aimed at, and whether there was more or less friction was immaterial. I think this case is governed by *Penn v. Bibby*, L. R. 2 Ch. 127. That was the case of a patent for a new kind of frictional bearings for the shafts of steamships, by the use of strips of wood for that purpose instead of having as formerly the metal shaft revolving in contact with metal. It was urged there that the same thing was familiar in the case of the shafts of grindstones and water-wheels, but the Court held that the invention was good. In delivering judgment, Lord Chelmsford said that in every case of this description one main consideration seems to be whether the new application of old things lies so much out of the track of the former one as not naturally to suggest itself to a person turning his mind to the subject but to require some application of thought and study. Applying that observation to this case, I think none of the old things which have been referred to would naturally suggest the plaintiff's contrivance, not even the mode of attachment of the arm of the blacksmith's bellows, if, as alleged, that had been in use for a long time in the precise form shewn in the evidence, which, however, is not very clearly made out. That it would not do so is, I think, manifest from the fact that the Barrett contrivance was the best that had been known or used in an extensive industry which had been carried on for many years. It would serve no useful purpose to cite many other cases which might be referred to, many of which are quoted with extracts in the judgments of the Supreme Court in

MACLENNAN,  
J.A.

LIV.

Since the case is now before the court, it is not necessary to state the facts in detail, but the facts are as follows:

I think the statement of the facts should be put in the form of a reference to the facts as stated in the judgment of the court.

### THE FACTS

#### THE FACTS

The defendant while acting as an agent for the plaintiff in his search for a new piano was discovered by the plaintiff in the plaintiff's workshop and was found to be in possession of the plaintiff's piano.

Held, that the defendant was guilty of the plaintiff's search and in the plaintiff's search was found to be in possession of the plaintiff's piano and was found to be in possession of the plaintiff's piano.

Judgment of the court.

This was an appeal by the defendant from the judgment of the court at the trial.

The following statement of the facts is taken from the judgment of the court.

The statement of the facts set forth several charges of slanderous words uttered in different occasions and also contained demands in respect of other charges of slander but ultimately all were withdrawn except the charges in the fifth, seventh and eighth paragraphs which were as follows:—

5th. The said defendant on or about the 8th day of April, 1896, falsely and maliciously spoke and published of the plaintiff to one Toelner and others, the words following: "John Bourgard (the plaintiff) has stolen from Hoerr's the wood for four or five pianos," the defendant thereby meaning that the plaintiff had been guilty of feloniously stealing wood and materials for pianos from the firm of F. & H. Hoerr.

**Statement.** 7th. The defendant on or about the said 8th day of April, falsely and maliciously spoke and published of the plaintiff to one Toellner and others, the words following, that is to say: "He (meaning thereby the plaintiff) stole the lumber which is in your (meaning thereby said Toellner) piano," the defendant meaning thereby that the plaintiff had been guilty of theft.

8th. The defendant on or about the 7th day of April, 1896, falsely and maliciously spoke and published of the plaintiff to one Liebeg and others, the words following, that is to say: "John Bourgard (meaning the plaintiff) stole a lot of varnish and lumber for five pianos from Hoerr's factory;" also: "He (meaning the plaintiff) stole all the lumber in Toellner's piano from Hoerr's factory," meaning thereby that the plaintiff had been guilty of theft.

The action was tried at Toronto, on the 14th of October, 1896, before MACMAHON, J., and a jury. Much evidence was given on both sides as to whether the words charged had been spoken on the several occasions set forth, and the jury found in favour of the plaintiff, assessing the damages in respect of the slanders charged in the fifth and seventh paragraphs at \$300; and in respect of the slander charged in the eighth paragraph at \$200.

The material facts relating to the matters complained of in the fifth and seventh paragraphs, were as follows:—

The plaintiff was a workman employed at the factory of one Hoerr, a pianoforte maker. The defendant was a person who had dealings with Hoerr in the way of his trade; and he also had a pianoforte factory, and one Toellner was in his employment. Hoerr had missed woods of various kinds and other materials used in the manufacture of pianos, and suspected the plaintiff of having taken them. He caused a search warrant to be issued for the purpose of examining the plaintiff's premises, and requested the defendant to accompany him, with the detective entrusted with the execution of the warrant, to the plaintiff's house in order to help him in identifying his property. It does

not exactly appear how the defendant could have been of any assistance to him in doing so, nor that Hoerr's suspicions of the plaintiff had been excited by anything that the defendant had told him. At all events the defendant did as he was asked, and the plaintiff's house was searched without anything of Hoerr's being found there. The statement of claim contained a charge of slander uttered by the defendant on that occasion, which the learned Judge held to be privileged, and withdrew from the jury. From something said by the women in the plaintiff's house while the search was being made, as to Toellner having employed the plaintiff in making up a piano, Hoerr and the defendant determined to see the material Toellner was using, and going down to the defendant's factory, Toellner was sent for and was asked to let them see the piano he was making at home. Toellner at first, it was said, refused. Barthelmes said you have got a piano in which there is some wood that has been taken from Hoerr, that Bourgard stole the wood and they wanted to see the piano, and if Toellner would not shew it, they would take out a warrant. Toellner then agreed to shew them the piano, and the three went together to Toellner's house for that purpose. Some wood and material were produced, which Hoerr identified rightly or wrongly as being his; and while there and engaged in the search and examination the defendant uttered the other words complained of in the presence of Hoerr, Toellner, and Toellner's wife, namely, that Bourgard had stolen the wood and not the wood for that piano alone, but also the wood for five or six others. The material identified was taken away by Hoerr, and there were some police court proceedings against the plaintiff afterwards in respect of it, which came to nothing, but the wood was not returned.

Judgment was entered in the plaintiff's favour for \$500 and costs, and the defendant's appeal from that judgment was argued before BURTON, OSLER, and MACLENNAN, JJ. A., on the 16th of March, 1897.

**Argument.** *E. Taylour English*, for the appellant. The statements complained of in the fifth and seventh paragraphs were made while an inquiry was in good faith being made for the purpose of finding out who had been guilty of a felony admittedly committed, and were privileged, and there being no evidence of malice, the plaintiff should have been non-suited: *Toogood v. Spyring*, 1 C. M. & R. 181; *Kine v. Sewell*, 3 M. & W. 297; *Padmore v. Lawrence*, 11 A. & E. 382; *Johnson v. Evans*, 3 Esp. 32; *Fowler v. Homer*, 3 Camp. 294; *Amann v. Damm*, 8 C. B. N. S. 597; *Howe v. Jones*, 1 Times L. R. 461; *Beatson v. Skene*, 5 H. & N. 838; *Jones v. Thomas*, 53 L. T. N. S. 678. The absence or presence of a police officer makes no difference; where an enquiry is set on foot the privilege lasts all through it. The untruthfulness in fact of the charge is not evidence of malice; the knowledge of the person uttering it of its untruthfulness, must be shewn: *Jenoure v. Delnege*, [1891] A. C. 73; *Hanes v. Burnham*, 23 A. R. 90. Moreover, as Toellner was a workman employed by the defendant, the latter was entitled to tell him what was being done. There was no evidence that the statement complained of in the eighth paragraph was made.

*John Greer*, for the respondent. Even if there was qualified privilege, there was evidence upon which the jury were justified in coming to the conclusion that the defendant knew he was making false charges. At any rate he acted in such a reckless manner that malice must be presumed: *Stuart v. Bell*, [1891] 2 Q. B. 341; *Heditch v. MacIlwaine*, [1894] 2 Q. B. 54; *Clark v. Molyneux*, 3 Q. B. D. 237; *Martin v. Strong*, 5 A. & E. 535. There was, however, no privilege, for before the words were spoken the inquiry had been completed. The defendant has denied making the statement complained of in the eighth paragraph, but another witness swears that the statement was made, and the jury have believed him and their verdict cannot be interfered with.

*E. Taylour English*, in reply.

May 11th, 1897. The judgment of the Court was Judgment delivered by

OSLER,  
J.A.

OSLER, J. A.:—

I see no reason to interfere with the finding of the jury upon the eighth paragraph. It was simply a question whether they believed the defendant or the witness Liebeg, and they have evidently accepted the latter's version of what occurred at the Liederkrantz meeting.

As to the fifth and seventh paragraphs. The only question is whether the occasion on which the expressions complained of were used, can be said to be privileged, so that the defendant in the absence of evidence of actual malice is not liable.

To state the law on the subject as laid down in one of the most recent decisions: "In order that the occasion upon which a defamatory statement is made may be privileged, it is necessary that the person to whom such statement is made, as well as the person making it, should have an interest or duty in respect of the subject matter of such statement. It is not sufficient that the maker of the statement honestly and reasonably believes that the person to whom it is made has such an interest or duty:" *Hebditch v. MacIlwaine*, [1894] 2 Q. B. 54; and *Harrison v. Bush*, 5 E. & B. 344, is approved, where Lord Campbell thus stated the law: "A communication made *bonâ fide* upon any subject matter in which the party communicating has an interest, or in reference to which he has a duty"—which includes, the learned Judge citing the case, adds, I may say, a duty moral or social—"is privileged, if made to a person having a corresponding interest or duty, although it contains criminary matter, which without this privilege would be slanderous and actionable."

Had then the defendant such an interest in making, or duty to make, and Toellner a reciprocal interest in receiving the communication complained of, as to make the occasions in question privileged? I think there was such an interest.

Judgment.

OSLER,  
J.A.

As to the defendant, he was at the request of Hoerr, the owner of the property alleged to have been stolen, aiding and assisting him in searching for and identifying it. The communications in question were made while engaged in such search and enquiry, in the presence of his friend, and while acting for his friend, to, or in the presence of, the person who had received the property from the plaintiff, and in whose possession it was then believed to be. I think such occasions were privileged as regards the defendant, just as they would have been as regards Hoerr, had he made the communications, and Toellner's interest in receiving them cannot be denied.

I think they would also be privileged for another reason, namely, that Toellner was a workman in the defendant's employment, and the defendant had an interest in informing Toellner that he was using material which did not belong to the person from whom he had received it, and was stolen property. Toellner had a corresponding interest in knowing this, and on these two grounds I hold that the occasions in question were privileged; and that the onus of proof of malice on the part of the defendant in making the communication was on the plaintiff; but if either of the occasions was privileged, and I think that made at the defendant's factory certainly was, the verdict in respect of the damages having been assessed in one sum for both, cannot stand as to either, and there must, as to them, be a new trial, because there is evidence which could not have been withdrawn from the jury as to actual malice in the repetition of the slander to Liebeg, and in the overstatement made at Toellner's house, viz., that the plaintiff had stolen not merely the wood for the piano Toellner was making, but also the material for five or six pianos: *Odgers' Law of Libel*, 3rd ed., pp. 320-21.

It may be that on a future trial this latter statement upon the evidence may be found capable of being treated as containing two distinct and severable charges; the first of which, as to the piano on which Toellner was working, is severable from the latter—the stealing the wood for

five or six pianos—and privileged, while the latter is not. But, however that may be, and I wish to say nothing which may control the action of the trial Judge in this respect, the recovery of single damages in respect of these several matters, some of which I regard as undoubtedly privileged as to the occasion, cannot stand, and therefore unless the plaintiff is content to abandon the claims under the fifth and seventh paragraphs of the statement of claim and to rest satisfied with his verdict on the eighth paragraph, there must be a new trial as to the former, and to that extent the appeal must be allowed.

Judgment.

OSLER,  
J.A.*Appeal allowed in part.*

R. S. C.



## LAUGHLIN V. HARVEY.

*Evidence—Negligence—Damages—Exposure of Body to Jury—New Trial—Jury—Misconduct of Juror.*

In an action to recover damages for alleged malpractice the plaintiff is not entitled to shew to the jury the part of the body in question for the purpose of enabling them to judge as to its condition.

*Sornberger v. Canadian Pacific R. W. Co.*, ante p. 263, approved and distinguished.

Decision of ARMOUR, C.J., reversed.

Attempting to dissuade a witness from giving evidence is such misconduct on the part of a juror as would justify the granting of a new trial.

**Statement.** THIS was an appeal by the defendant from the judgment at the trial.

The defendant was a surgeon and the action was brought against him to recover damages for alleged negligence in setting the plaintiff's broken leg.

The action was tried at Barrie before ARMOUR, C. J., and a jury, when a verdict was found in the plaintiff's favour for \$500, and judgment for that sum was granted.

The defendant appealed, and the appeal was argued before BURTON, OSLER, and MACLENNAN, JJ.A., on the 15th and 18th of January, 1897.

The appellant contended that there was no evidence of negligence, and also in the alternative that there should be a new trial, because of the misconduct of a juror in attempting to dissuade a witness from giving evidence, and because the plaintiff's leg had been exhibited to the jury.

*Osler, Q. C.*, and *W. M. Douglas*, for the appellant.

*H. Lennox*, for the respondent.

May 11th, 1897. The judgment of the Court was delivered by

OSLER, J. A. :—

[The learned Judge discussed the evidence and came to the conclusion that the plaintiff had failed to prove negligence, and then continued :]

I think the case comes within the principle of the well-known decisions of *Jackson v. Hyde*, 28 U. C. R. 294, and *Fields v. Rutherford*, 29 C. P. 113, and therefore that the appeal should be allowed.

Judgment.

OSLER,  
J.A.

If the action is not to be dismissed, then I think there should be a new trial on the ground (1) that the verdict is so greatly against the weight of evidence as to be unreasonable; and (2) the misconduct (which is not denied) of the jurymen White, as testified to by the witnesses Sarah and Peter Wray.

[The statement in Sarah Wray's affidavit, corroborated by Peter Wray's affidavit, is this:—

White spoke to me about the case. \* \* He said that when I gave my evidence I must remember that the Laughlins were poor boys and that I was to consider their poor old mother anyway as if they lost the case they would be ruined, and that James A. Harvey was a rich man and that if he lost \$4,000 or \$5,000 he would not feel it. He advised me not to say anything that would hurt them, the Laughlins, if I could help it.]

In the language of Pollock, C. B., in *Allum v. Boulton*, 9 Exch. 738, "there has not been that fair and impartial trial by an unbiassed jury, which every one, be his station what it may, whether it be that of a rich man or of a poor man, is entitled to in this country. It has been said that this misconduct was most probably overruled by the correct feeling of the rest of the jury. I am not sure of that. It is frequently the case that the temper of such a person as could give utterance to that kind of expression, is of a character active enough to give effect to the feeling which produced the sentiment, by working upon the weaker and more forbearing of those who are associated with him."

The case of *Ramadge v. Ryan*, 9 Bing. 333, is also a strong authority against the verdict. In that case as in this, the expressions said to have been used by the jurymen were so used before he was sworn as a juror in the cause, and a new trial was refused only because he denied on affidavit having made use of the language which con-

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J.A.

stituted the sting of the charge. What the juror White is sworn to have said would, had it been known, have been good ground for challenge, since it shews that he was not likely to have acted impartially after having heard the evidence.

With regard to the remaining objection, namely, that the learned Chief Justice permitted the plaintiff to exhibit his injured leg to the jury, it is unnecessary to say much. The question has recently been considered in the other Division of the Court in *Sornberger v. Canadian Pacific R. W. Co.*, ante p. 263. I have been favoured with the perusal of the learned Chancellor's judgment in that case, and I may be permitted to say that I agree with what is there decided. It was held that the plaintiff might shew the jury the injured limb or body for the purpose of being examined thereon by a physician. The jury were told that they were not to look at the leg and draw any conclusion from its appearance. It was only for the evidence of the doctor who asked to see it in order that he might explain the nature of the injuries more clearly. This seems to me free from objection. But it was not what was done in the case before us. The plaintiff was allowed to exhibit his leg, apparently for no other purpose than that the jury might see it, quite unconnected with the medical evidence of its condition, which was undisputed, and they were not warned that they were not to draw any inference of negligence from its appearance. It seems to me that this was a course which the defendant might well complain of, and that it was calculated to prejudice him extremely with the jury. The difference between a deliberate and studied exhibition of this kind, and the casual and necessary view which a jury must have of parts of the body always exposed to view hardly needs to be emphasized. A recent case on this subject is *Hall v. Manson*, [1896, Iowa], 34 L. R. A. 207.

*Appeal allowed.*

R. S. C.

## FRASER V. RYAN.

*Sale of Land—Contract—Rescission—Purchase Money—Promissory Note  
—Deposit—Forfeiture.*

Where a contract for the sale of property is rescinded by the vendor for default of payment of the purchase money, he cannot afterwards recover from the purchaser the amount of a promissory note given by the latter before the default, in part payment.

*Seemle*, moneys paid by the purchaser after rescission cannot be recovered back by him.

Judgment of STREET, J., reversed.

THIS was an appeal by the defendant from the judgment Statement. of STREET, J., in favour of the plaintiff in an action upon a promissory note for \$400 and interest.

On the 18th February, 1895, an agreement in writing was made between the plaintiff and the defendant as follows :—

“ Alexander Fraser agrees to sell and Peter Ryan agrees to buy timber berth \* \* for \$115,000, payable in thirty days from date, \$500 paid on account, and promissory note \$500, payable in ten days after date.”

On the same day the defendant paid the plaintiff \$500, and gave him his promissory note for \$500.

The defendant not having paid the amount of the note nor any part of it, nor the balance of the purchase money, nor any part of it, the plaintiff on the 2nd May, 1895, wrote to the defendant as follows :—

“ Referring to the agreement made for the sale by me to you of timber berth \* \* on the 18th February last, for \$115,000, payable in thirty days from date, on which \$500 was paid on account, and your promissory note was given for \$500 more, payable in ten days after date, I beg to say, so as to prevent any misunderstanding, that your failure to pay the balance of the purchase money at the time named entitled me to claim, as I did claim, the right to rescind the contract, and I therefore beg to inform you that I am advised that I now hold the limit free from any claim on your part, and have an absolute right to dispose

**Statement.** of it as if no contract had been made between you and me respecting it."

On the 10th August, 1895, the defendant wrote to the plaintiff as follows:—

"Your solicitors \* \* write demanding payment of \$515, amount of a note given you, and threatening suit. I paid you \$500 through the representations of a swindler, and would even pay you the remaining \$500, but I have not got it; so just wait till I fall on something, when I will pay you, providing no writ is issued; but no one can collect from me what I don't possess \* \*."

On the 7th September, 1895, the defendant wrote to the plaintiff's solicitors a letter marked "without prejudice," as follows:—

"The very best I can do is to send \$100, if acceptable, and my renewal note for \$400, with interest, and, if acceptable, let me know how much I have to add to the \$100, and I will remit by return. I cannot do more; so, if not accepted, you can take legal steps to recover, but I tell you frankly and honestly that you will do no good in that course; but I will pay the note enclosed, when due, and give no further trouble; no matter what comes, I will see to that. And back interest on the \$100, and I will remit by return mail."

The \$100 and the note for \$400 were accepted by the plaintiff, and the note was that upon which recovery was sought in this action.

The appeal was argued before BOYD, C., and FERGUSON and ROBERTSON, JJ., sitting as a second division of the Court of Appeal, on the 9th March, 1897.

*Haverson*, for the appellant. After the plaintiff had cancelled the contract on the 2nd May, 1895, the money payable under it could not be collected. The defendant was not bound to pay the \$500 note, and the \$400 renewal note was given without consideration. The learned trial Judge treated the promissory note for \$500 as a forfeited deposit; but it was not a deposit; it was a part of the purchase

money; the plaintiff cannot have the purchase money and the timber limit too. Giving the note and renewing it did not change the character of the proposed payment. I refer to Dart on Vendors and Purchasers, 6th ed., vol. 1, p. 222; *Palmer v. Temple*, 9 A. & E. 508. Argument.

*McCarthy*, Q. C., for the plaintiff. *Palmer v. Temple* is practically overruled by *Howe v. Smith*, 27 Ch. D. 89. The extension of time given was a sufficient consideration to support the note sued on. The original \$500 note was a deposit given as a guaranty for the due performance of the contract, although it was also part payment of the purchase money, and, on default in performance of the contract, was forfeited to the plaintiff. Although there was no stipulation in the written agreement for the forfeiture of the deposit, the vendor had a right to retain it, as a provision for forfeiture is by law implied in such contracts: *Howe v. Smith*, 27 Ch. D. 89; *Ex p. Barrell*, L. R. 10 Ch. 512; *Soper v. Arnold*, 37 Ch. D. 96; *Collins v. Stimson*, 11 Q. B. D. 142; Dart on Vendors and Purchasers, 6th ed., vol. 1, p. 222. The fact that a promissory note was given cannot make the sum represented by it any less a deposit, and it must be so treated, or, at any rate, as security for such deposit which the vendor would be entitled to enforce: *Hinton v. Sparkes*, L. R. 3 C. P. 161. The defendant is estopped from denying his liability.

*Haverson*, in reply. The words of the contract quite clearly shew that the note is not a deposit.

June 24, 1897. BOYD, C.:—

The nature of a deposit on sale of property is considered by Lord Chief Justice Campbell in *Ockenden v. Henly*, E. B. & E. at p. 492. He says: "It is well settled that, by our law, following the rule of the civil law, a pecuniary deposit upon a purchase is to be considered as a payment in part of the purchase money, and not as a mere pledge."

This primary position has, however, been supplemented in subsequent cases, whereby the deposit is also regarded

Judgment.  
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as a guaranty for the performance of the contract or a security for the completion of the purchase, so that if the contract goes off by the purchaser's default, the vendor retains the deposit as forfeited.

The whole matter is very learnedly discussed by Fry, L. J., in *Howe v. Smith*, 27 Ch. D. 89, 101, and this double aspect of the deposit has received the sanction of the House of Lords in *Soper v. Arnold*, 14 App. Cas. 429, 435.

Now, in the present case, the decision of the question rests upon the terms and construction of the written contract, which cannot be varied by the effect of antecedent evidence of intention. The agreement reads thus: "A. F. agrees to sell and P. R. agrees to buy timber berth, etc., etc., for \$115,000, payable in thirty days from date, \$500 paid on account, and promissory note for \$500, payable in ten days after date."

The deposit in this case was the \$500 paid down, which (as the contract went off by the default of the purchaser, and the election of the vendor thereafter to rescind by letter of 2nd May, 1895,) became forfeited and irrecoverable by the purchaser.

The note for \$500 represents part of the price, and that was renewed, and \$100 paid thereon, and this also is irrecoverable; but as to the balance of \$400 on the note, that still represents so much of the purchase money; and, as the contract is ended, the consideration therefor has ended also; so that the vendor cannot be allowed to recover that as part of the price, and also hold the land as his own. The contract has been ended by mutual action of the parties, and the law leaves them where they have put themselves. Whatever money has passed from one to the other cannot be recovered—nor can the note be recovered from the hands of the vendor, nor can he sue upon it to recover the amount of it from the purchaser. The contract is at an end, and all rights thereunder and remedies thereon end therewith, except that damages for the breach of it may be sought by the vendor: *Icely v. Grew*, 6 N. & M. 467.

In *Cameron v. Bradbury*, 9 Gr. 67, the vendor had recovered judgment for a part of the purchase money. Afterwards he cancelled the agreement, as he might by the terms of the contract, and it was held that, having cancelled the contract, he could not afterwards enforce the judgment. The principle indicated by the Vice-Chancellor applies here: "The vendor takes back the land; he cannot do that and at the same time asks for the purchase money; the very essence of such a transaction is, that the vendor keeps the land, and the purchaser the purchase money."

Judgment  
Boyd, C.

In brief, I do not see that the doctrine applicable to "deposit" applies to this subsequent payment, which was not part of the deposit.

I would, therefore, dismiss the action with costs.

FERGUSON and ROBERTSON, JJ., concurred.

E. B. B.

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## IRVINE V. MACAULAY.

*Limitation of Actions—Vendor and Purchaser—Purchaser in Possession—Implied Trust—Tenant at Will—R. S. O. ch. 111, sec. 5, sub-secs. 7, 8.*

Sub-section 8 of section 5 of R. S. O. ch. 111, applies to the case of an implied trust, and a purchaser in possession with the assent of his vendor, and not in default, is, therefore, not to be deemed to be a tenant at will to his vendor within the meaning of sub-section 7 of that section.

*Warren v. Murray*, [1894] 2 Q. B. 648, applied.  
Judgment of a Divisional Court, 28 O. R. 92, affirmed.

**Statement.** THIS was an appeal by the defendants from the judgment of a Divisional Court [MEREDITH, C. J., and ROSE and MACMAHON, JJ.], reported 28 O. R. 92, where the facts are stated, and was argued before BOYD, C., and OSLER, MACLENNAN, and MOSS, JJ. A., on the 28th of May, 1897.

*Shepley*, Q. C., and *H. W. Delaney*, for the appellants. It is clear that a person going into possession under an agreement to purchase is a tenant at will merely: *Jones v. Cleveland*, 16 U. C. R. 9. and the payment of an instalment of purchase money makes no difference in this respect, and does not operate as a determination of the then existing tenancy at will and the establishment of a new tenancy at will: *Day v. Day*, L. R. 3 P. C. 751; *McLaren v. Morphy*, 19 U. C. R. 609. The statute had begun to run in the present case before the payment was made, and the payment did not stop its running, but even if it did, the statute ran from the date of the payment, and even on that basis the action would be too late. Such a payment is not a payment of rents and profits: *Henderson v. Henderson*, 27 O. R. 93, and is not equivalent to an acknowledgment of title: *Cahuac v. Scott*, 22 C. P. 551; *Ruttan v. Smith*, 35 U. C. R. 165. The proof of the plaintiff's title is defective.

*Clute*, Q. C., for the respondent. There is sufficient proof of the plaintiff's title.

[BOYD, C. :—You need not argue that point, Mr. Clute. Argument.  
No objection to the title is pleaded, and the point has not been taken in the Court below.]

It must be admitted that the tenancy at will would, without anything else being done, come to an end at the end of the year, but the payment subsequently made was an acknowledgment of title, and a new tenancy at will then began. This is the proper implication to be drawn from *Jones v. Cleaveland*, 16 U. C. R. 9. Apart from any question of tenancy, the vendor's right to possession did not arise till November, 1854, when default was made in payment of an instalment, and if the statute applies it only began to run from that time: *Doe d. Bourne v. Burton*, 15 Jur. 990. But the statute does not apply at all, for the agreement for sale had the effect of placing the parties to it in the position of trustee and *cestui que trust*: *Warren v. Murray*, [1894] 2 Q. B. 648; *Building and Loan Association v. Poaps*, 27 O. R. 470.

*Shepley*, Q. C., in reply. In *Warren v. Murray*, [1894] 2 Q. B. 648, there was a provision giving the tenant the right to the beneficial enjoyment of the premises, and the tenant had discharged his obligation in full. It is true that the remarks of Kay, L.J., go further than this, but he stands alone, and the doctrine is inapplicable to the case of vendor and purchaser. It was the lessee in that case who became trustee for the lessor. The exception in the statute refers only to express trusts: *Darby and Bosanquet on the Statutes of Limitations*, 2nd ed., pp. 356, 357.

June 30th, 1897. BOYD, C. :—

I agree with the conclusions of fact in the Courts below that there was a new contract of sale for half the land in 1852, and that the possession of the defendants is attributable to that transaction.

This action of ejectment was begun on the 19th of October, 1879, and by the Administration of Justice Act, then in

Judgment. force, the Courts of Law and Equity were made auxiliary  
Boyd, C. to one another, and the defendant in ejectment might set up any facts shewing that he was on equitable grounds entitled to retain possession [36 Vict. ch. 8 (O.)]. All the evidence was fully given in this case as if such a defence had been pleaded, and it has to be dealt with.

Before this date it would have been needful for the defendant if he sought equitable relief to have taken independent proceedings in a Court of Equity to stay the legal action for possession. But if in whatever shape equitable relief could be obtained to preserve possession in the defendants as purchasers of the land in question, then according to *Warren v. Murray*, [1894] 2 Q. B. 648, there was no right on the part of the legal owners of the fee to make an effective entry or bring an effective action for the recovery of possession so as to set going the Statute of Limitations. Till there was default in payment of the purchase money such right to inhibit ejectment by the purchaser in possession did exist; upon default, however, he could be ejected, and the date of his default would supply the period of time from which the statute would begin to run against the vendor and in favour of the purchaser. Now, the payment of purchase money to the extent of £40 principal and £4 for interest is clearly proved on the 22nd of October, 1853, (probably attributable to the payment to be due on the 1st of November), and there was no further payment due for a year; taking that as the 22nd of October, or the 1st of November, 1854, this writ was issued within twenty years from either date, so that the defence of the statute would not apply.

Further than this, I favour strongly the view enunciated by Lord Justice Kay in that late case, to the effect that the clause of the Act giving the starting point in cases of tenancy at will does not apply to the case of a tenant at will who is also a *cestui que trust*. That is with us R. S. O. ch. 111, sec. 5, sub-sec. 7. Sub-section 8 reads that no mortgagor or *cestui que trust* shall be deemed to be a tenant at will (within the meaning of sub-section 7) to his mortgagee or

trustee. It is well-known law that when a contract is made for the sale of an estate equity considers the vendor as a trustee for the purchaser of the estate sold and the purchaser as a trustee of the purchase money for the vendor: Sugden on Vendors, 14th ed., p. 175. This is a case of implied trust, which is something more than a constructive, and something less than an express, trust. But that this clause of the statute extends to and applies to the case of an implied trust in this sense was distinctly held by Kay, L.J., in *Warren v. Murray*, [1894] 2 Q. B. at p. 656. He reads the case of *Drummond v. Sant*, L. R. 6 Q. B. 763, as involving the same result, though the word there used by Blackburn, J., was "direct" trust. It is evident that the ruling at *nisi prius* of Patteson, J. (after consulting Creswell, J.), that the proviso of the statute applied only to cases of express trusts, as reported in *Doe d. King v. Rock*, 4 M. & Gr. 30, is discredited and disregarded by the Court of Queen's Bench in *Drummond v. Sant*, L. R. 6 Q. B. 763. It is pointed out by Kay, L. J., that the epithet "express" is not used in the statute at this place, though it is employed later on. This consideration affords a strong reason against reading it into the earlier clause.

Judgment.  
Boyd, C.

The whole matter is very ably and exhaustively handled in the last edition of Smith's Leading Cases, vol. 2, 10th ed., pp. 679-686, and the conclusion indicated that a purchaser in possession under a contract to buy and not in default, though a tenant at will, is more than that, and that the case is not one aimed at or included in the Limitations Act.

As to such an one, the better opinion is that the law remains as it was before the Act. That is to say, his possession is attributable to the contract, and as long as he is not in default his possession is that of the vendor. Upon default he can be put out, and from the time that it is made to appear that the contract is at an end the statute will begin to run: *Doe d. Counsell v. Caperton*,

**Judgment.** 9 C. & P. 112; *Doe d. Milburn v. Edgar*, 2 Bing. N. C. 498; *Howard v. Shaw*, 8 M. & W. 118.

**Boyd, C.**

The judgment should be affirmed with costs.

OSLER, J. A. :—

I agree in affirming this judgment, on the ground that the case is not within sub-section 7 of section 5 of the Real Property Limitations Act. The evidence quite supports a finding that a new contract of sale was in March, 1852, made between Lemesurier, as vendor, and the defendants' father, as vendee, of the half lot in question for the sum of £240, payable in six yearly instalments of £40 each, commencing in November, 1853, and that in that month the vendee paid the first instalment with interest. When this agreement was made, Macaulay, senr., was already in possession of the land under a previous arrangement, the terms of which are not important, and he remained in possession, as may properly be inferred, with his vendor's assent, being thenceforward until his death, some time in the fall of 1857, tenant at will of the vendor. If that tenancy was a tenancy at will within the meaning of section 7 of the Act C. S. U. C. ch. 88, formerly part of section 19 of 4 Wm. IV. ch. 1, the statute is a bar to this action, which was not commenced until the 19th of October, 1874, more than twenty-two years after the tenancy began. I am unable with all respect to concur in the view that the payment of the instalment in November, 1853, constituted a new tenancy at will, or *punctum temporis* for the running of the statute. The case of *Day v. Day*, L. R. 3 P. C. 751, 761, I regard as directly opposed to that proposition, and see also *Ryan v. Ryan*, 4 A. R. 563; 5 S. C. R. 387. Apart, however, from the relation of landlord and tenant, the parties as vendor and purchaser were respectively in the position of trustee and *cestui que trust*, and the proviso at the end of section 19 of the original Act and section 8 of the Consolidated Statute expressly declares that no mortgagor or *cestui que trust*

shall be deemed to be a tenant at will within the meaning of section 19 or of section 7 to his mortgagee or trustee; that is to say, for the purpose of those sections.

Judgment.

OSLER,  
J.A.

I think that the cases of *Garrard v. Tuck*, 8 C. B. 251; *Drummond v. Sant*, L. R. 6 Q. B. 763, and *Warren v. Murray*, [1894] 2 Q. B. 648, in which the two former cases would appear to be approved, warrant us in holding that the proviso and section extend to the case of an implied trust which is that existing between vendor and vendee, and are not confined to the case of an express trust. If that be so, the tenancy in question was not within the Act, and the right of entry accrued only on its actual determination, which was not earlier than the death of Henry Macaulay, within twenty years of which, and therefore in time to prevent the bar of the statute, the action was brought.

MACLENNAN, J. A. :—

[The learned Judge stated the facts and continued :]

It is well settled that a purchaser who is in possession under his contract is at law a tenant at will to his vendor, and I am unable to see how it can be held that the payment of an instalment of purchase money, in pursuance of the contract, can be regarded as a renewal of the tenancy. Such a tenancy requires no renewal unless it has been terminated, and unless a payment can be regarded as a termination of the old tenancy it cannot be a renewal of it. Therefore, I am unable to accede to the argument with which we were pressed, that the payment on the 1st of November, 1853, created a new tenancy at will. The tenancy, therefore, in my judgment, began on the 6th of March, 1852, and if sub-section 7 of section 5 of the Statute of Limitations is applicable to such a case the statute began to run against the vendor's legal right on the 6th of March, 1853, more than twenty years before the bringing of the action.

I am, however, of opinion that the sub-section is not applicable to the possession of a purchaser not in default.

Judgment.MACLENNAN,  
J.A.

By the doctrine of equity, the vendor is by virtue of the contract a trustee for the purchaser of the legal title, to be conveyed to him when he has performed its terms, and the purchaser is *cestui que trust*. The vendor is not an express trustee, but the trust is implied from the instrument which the parties have signed, and it is therefore as proper to be excluded from the operation of the section as the most express trust. It is not like the constructive trusts referred to by Sir William Grant in *Beckford v. Wade*, 17 Ves. 87, cited by Lord Blackburn in *Drummond v. Sant*, L. R. 6 Q. B. 763. It would, indeed, be a great anomaly that time should in law be running against a vendor for not bringing an action or making an entry, whose action or entry if he brought or made it would be illegal, and would be restrained by injunction, on the simple production of the document which he had signed. I think this view of the case has now received the sanction of the Court of Appeal in England, in *Warren v. Murray*, [1894] 2 Q. B. 648. If that is so, then the tenancy at will continued, and the statute did not begin to run against Lemesurier, until Macaulay's death in 1857. See also *White v. Whitewood*, 13 Times L. R. 409.

But even if we suppose the legal right of the plaintiff to have been barred, Lemesurier had an equitable right, a right to an action for specific performance. That action he clearly could not have brought until the 1st of November, 1854, when default was made in payment of the second instalment; and by section 31, the same time is allowed for bringing such an action as if his right had been legal, that is twenty years from the time when the right first accrued.

It is true that the doctrines of equity in refusing relief on the ground of acquiescence or otherwise, are saved by section 35; but there was nothing in the conduct of the plaintiff or in the circumstances of the parties to make it inequitable on the part of the plaintiff to seek for specific performance at any time within the statutory period. The purchaser was in the full enjoyment of the land, and if he

had not got his title it was his own fault in not fulfilling the terms of his contract by paying his purchase money and applying for his conveyance : see Fry on Specific Performance, 3rd ed., sec. 72 ; *Kenney v. Wexham*, 6 Mad. 355 ; *Eastern Counties R. W. Co. v. Hawkes*, 5 H. L. C. 331, 359, 376 ; *Archbold v. Scully*, 9 H. L. C. 360 ; *Darby and Bosanquet* on the Statutes of Limitations, 2nd ed., pp. 356, 357, 364, 365.

Judgment.  
MACLENNAN,  
J.A.

I think that the appeal should be dismissed.

Moss, J. A. :—

The defendants' objections to the proof of the plaintiff's paper title having been disposed of adversely to them upon the argument of the appeal, there remains the question of their claim of title to the lands by virtue of the Statute of Limitations. I agree that the evidence supports the holding below, that there has been proved an agreement between Henry Lemesurier and Henry Macaulay, entered into on the 6th of March, 1852, for the purchase by the latter of the east half of lot 10 in the 1st concession of Murray, for the price of £240 payable in six annual instalments of £40 each, the first payment to be made on the 1st of November, 1853, and further that in pursuance of this agreement Henry Macaulay did about the 1st of November, 1853, pay to Henry Lemesurier, the sum of £44, being the first instalment of principal and £4 interest thereon.

At the time of the making of the agreement Henry Macaulay was in possession of the premises. The agreement was, very naturally under the circumstances, silent as to possession, and Henry Macaulay and those claiming under him have been in possession ever since without, so far as appears, making any payment on account of the purchase money other than the payment of £44 on the 1st of November, 1853.

It is conceded that, assuming the existence of the agreement of the 6th of March, 1852, the prior possession



Judgment.

Moss,  
J.A.

cannot aid the defence, and the claim of title under the statute must depend upon the possession subsequent to that date.

Robertson, J., held that upon and from that date Henry Macaulay's occupancy was as tenant at will within the meaning of section 7 of C. S. U. C. ch. 88; that Henry Lemesurier's right to bring an action to recover the land was to be deemed to have first accrued on the 6th of March, 1853, there having been no prior determination of such tenancy; that the payment of £44 on the 1st of November, 1853, did not interfere with the running of time against Lemesurier, and that his right, and the right of those claiming under him, to recover the land became barred on the 6th of March, 1873.

The provision in force in March, 1852, was the 19th section of the Act 4 Wm. IV. ch. 1. This was in the consolidation of 1859 carried into, and then became, sections 7 and 8 of C. S. U. C. ch. 88.

If it be granted that Henry Macaulay's occupancy was a tenancy at will to which section 7 of C. S. U. C. ch. 88 applied, it is difficult to see how the payment of an instalment of purchase money made after the 6th of March, 1853, had any effect upon the running of time which commenced on that day.

To have the effect of putting an end to the time running in the case of a tenancy at will within the 7th section there must be an actual or constructive restoration of possession to the owner; and so far as regards the bar under the statute, there appears to be now no such thing as a continuous tenancy at will.

It may now be considered as settled that where a tenancy at will is actually determined more than a year after its commencement, and the tenant remains in possession without a fresh tenancy at will being created, time does not run for the purposes of the statute from the actual determination of the tenancy, but from one year after the commencement of the tenancy at will; it runs in fact as if the actual determination had never taken place: see

Darby and Bosanquet on the Statutes of Limitations, 2nd ed., p. 349, and cases there cited.

Judgment.

Moss,  
J.A.

If Henry Macaulay was, on the 6th of March, 1852, in possession of the premises as a tenant at will merely, the statute began to run against Henry Lemesurier, and those claiming under him, on the 6th of March, 1853, and the subsequent acts of the parties were not such as operated to prevent its continuing to run.

The only acts shewn in addition to the payment on the 1st of November, 1853, are that on the 9th of December, 1866, there was served upon some of the parties to this action then in possession, a demand for delivery of possession, and that this was followed in 1867 by the issue of a writ of ejectment. But while these acts amounted to a determination of the vendor's will, they were not followed by the recovery of, or entering into, actual possession of the premises, nor by receipt of rents from the defendants in occupation, nor by any agreement or arrangement for the continuing of the defendants in possession under, or in recognition of, the title of the vendors.

In other words, the vendors were not in any manner restored to the possession of the property.

There was no revesting of possession; there was no fresh tenancy created, and the running of the statute was in no wise impeded by what was done.

So the service of the demand and the institution of the action (not followed up by judgment and subsequently abandoned), could only have the effect of making the defendants in possession tenants at sufferance, Henry Macaulay the purchaser having been—for the purposes of the statute—a tenant at sufferance from the 6th of March, 1853: *Day v. Day*, L. R. 3 P. C. 751, 761.

If a purchaser of lands under an agreement for payment of the purchase money in instalments, who goes into possession before the time fixed for completion and before payment of all his purchase money and conveyance to him, is, notwithstanding he is not in default in payment of his purchase money according to the terms of the agreement,

Judgment.  
Moss,  
J.A.

a tenant at will, to whom the provisions of sub-section 7 apply, the defendants have acquired the land as against the plaintiff.

*Doe d. Tomes v. Chamberlaine*, 5 M. & W. 14, and *Ball v. Cullimore*, 2 C. M. & R. 120, relied upon in *Jones v. Cleaveland*, 16 U. C. R. 9, did not deal with the effect of section 7 of the Imperial Act, 3 & 4 Wm. IV. ch. 27, as respects the operation of time in the case of a purchaser in possession pending completion of his purchase.

The Court was dealing with the question of the nature of the holding, merely with the view of ascertaining whether or not notice to quit before action was necessary.

Neither in them nor in the case of *Robinson v. Smith*, 17 U. C. R. 218, was it necessary to discuss the question of the right of the purchaser to claim the intervention of the Court of Chancery to award specific performance of the agreement of purchase and restrain the action of ejectment.

In *Jones v. Cleaveland*, 16 U. C. R. 9, the Court adopted the view that a purchaser in possession was a tenant at will for the purposes of the Statute of Limitations, and so carried the rule beyond what was determined in the cases previously mentioned. The position of the purchaser in equity does not appear to have been put forward or considered as affecting the operation upon his position of the proviso in section 19 of 4 Wm. IV. ch. 1 (now section 8), but it was assumed that he stood in precisely the same position as regards the running of time as did any tenant at will.

But the position of a purchaser with relation to the land he has contracted to purchase does not seem to me to be similar to that of an ordinary tenant in possession.

As said by Lord Coleridge, in *Clarke v. Ramuz*, [1891] 2 Q. B. 456: "In the case of a contract for the sale and purchase of land, although the legal property does not pass until the execution of the conveyance, during the interval prior to completion the vendor in possession is a trustee for the purchaser, and as such has duties to perform towards him."

One of these duties, as shewn by the decision in that case, is to use reasonable care to preserve the property from deterioration or spoliation, so that the vendor may be able, upon completion, to hand it over in as good a condition as at the date of the purchase.

Judgment.

Moss,  
J.A.

Another of the duties imposed upon the vendor remaining in possession, is that of accounting for the rents and profits properly received or receivable, pending the completion of the contract.

In the ordinary simple case of a trustee of the legal estate of lands for another the trustee is bound, and the *cestui que trust* can compel him, to place the latter in possession of the estate.

In the absence of stipulation in the agreement a vendor may not be obliged to give his purchaser possession until completion.

But if he chooses to remain in possession himself he subjects himself to the obligations just mentioned.

Now, if he prefers to relieve himself of these obligations to his *cestui que trust*, by giving him possession pending the contract, is such possession the same in character as if it was not taken or held under such circumstances?

The purchaser seems, in such case, to acquire a right to retain possession, unless he makes default under the agreement, and on proceedings brought against him, elects not to pay his purchase money into Court: see *Greenwood v. Turner*, [1891] 2 Ch. 144.\*

It may be that a purchaser is not, for all purposes, in the same position as a *cestui que trust* of lands who is to be regarded as the equitable owner, but I think he is so far a *cestui que trust* entitled to receive, upon completion of the agreement, the rents and profits, and the estate itself in as good a plight as at the date of the contract, that if the vendor chooses, in order to avoid the necessity for accounting to, and preserving the estate for, him to place him or permit him to remain in possession, his occu-

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\*See also *Raffety v. Schofield*, [1897] 1 Ch. 937, at pp. 943-4.

Judgment.

Moss,  
J.A.

pancy is such a possession of a *cestui que trust* as will exclude the operation of the 7th section of the Act.

I think this was the nature of the occupancy of Henry Macaulay, the elder, and those claiming under him, up to a period within twenty years before the commencement of this action. The language of the Lords Justices in delivering judgment in *Warren v. Murray*, [1894] 2 Q. B. 648, appears to me to apply to the position of the parties in this case.

To adapt the language of Lord Justice Kay, at p. 656, what is the meaning of "*cestui que trust*" in sub-section 8 of section 5 of the Act? Does it include a person who, by the terms of an agreement, is placed in a position which equity regards as that of a *cestui que trust*? If it does, then the present case does not seem to be within sub-section 7, because there is in the agreement that which, by the doctrine of equity, constitutes a fiduciary relation between the parties.

I think the appeal fails, and should be dismissed with costs.

*Appeal dismissed.*

R. S. C.

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## MCLEOD V. NOBLE

*Appeal—Interim Injunction—Contempt—Practice—Ex parte Motion—Parliamentary Elections—Recount—Jurisdiction of High Court.*

Where, after the expiration by effluxion of time of an interim injunction order, proceedings are taken against a party to the action to commit him for contempt for disobeying the order, an appeal by him against the interim order will lie; BURTON, C. J. O., dissenting.

A Judge of the High Court has no jurisdiction to restrain by injunction a County Court Judge and Returning Officer from holding a recount of the ballots cast at an election for the House of Commons; BURTON, C. J. O., expressing no opinion on this point.

*In re Centre Wellington*, 44 U. O. R. 132; *Re North Perth*, *Hessin v. Lloyd*, 21 O. R. 538, considered.

Where an injunction is being applied for *ex parte* counsel who desire to appear in opposition to the application should be heard.

Judgment of ROBERTSON, J., reversed.

THIS was an appeal by the defendant George F. Bruce Statement.  
from the judgment of ROBERTSON, J.

The plaintiff and one Duncan Graham were the candidates at an election of a member of the House of Commons of Canada for the Electoral District of the North Riding of the county of Ontario, holden on the 28th of January and 4th of February, 1897. The defendant Bruce was returning officer at the election, and on the 11th of February declared Graham elected by a majority of thirty-nine votes. On the same day the plaintiff applied to His Honour Judge Mahaffy, Judge of the District Court of Muskoka and Parry Sound, for a recount, which was directed to take place on Tuesday, the 16th of February, 1897, at Bracebridge. On the same day notice of the appointment was served on Graham and also on the defendant Bruce. The defendant Noble was the agent of Graham, and on the 13th of February, 1897, obtained an appointment from His Honour Judge Dartnell, Judge of the County Court of Ontario, for a recount before him on the 15th of February, 1897.

This action was brought on the 15th of February, 1897, against Noble, Dartnell and Bruce, asking for an injunction to restrain them from entering upon and proceeding with that recount. On the same day an application for an

**Statement.** interim injunction was made before ROBERTSON, J., who granted it. The order as issued, omitting the formal recitals and the undertaking as to damages, was as follows :—

1. This Court doth order that the said defendants Robert M. Noble, George F. Bruce and George H. Dartnell be and they are hereby respectively enjoined and restrained until Thursday, the 18th day of February, instant, or until further order be made herein, from entering upon, or in any way further proceeding with, any recount of the votes given or ballots cast at the election of a member of the House of Commons of Canada for the Electoral District of the North Riding of the county of Ontario holden on the 28th day of January and the 4th day of February, 1897, and from opening any of the sealed packets containing the used or rejected or spoiled ballot papers which were deposited in the ballot boxes, or received from voters by the deputy-returning officers at the said election.

2. And this Court doth further order that the said defendant Dartnell be similarly enjoined and restrained until the said 18th day of February, instant, or until further order be made herein, from certifying to the defendant Bruce as the returning officer at the said election the result of any such recount of the said ballots.

3. And this Court doth further order that the defendant George F. Bruce, the returning officer at the said election, and his election clerk, be and they are hereby severally enjoined and restrained until the said 18th day of February, instant, or until further order be made herein, from attending before the said defendant Dartnell with the parcels containing the ballots used at the said election, or delivering such parcels or any of them to the said defendant Dartnell, and from making any return to the Clerk of the Crown in Chancery of the result of the said election until the said defendant Bruce, as such returning officer, shall have received from William Cosby Mahaffy, Esquire, the Judge of the District Court of the Provisional Judicial District of Muskoka and Parry Sound, a certificate of the

result of the recount of the said ballots to be had before the said William Cosby Mahaffy, the Judge of the said District Court. Statement.

It was known that the injunction was to be applied for and when the motion was mentioned in Court, counsel on behalf of the defendants asked to be heard in opposition to the application. The learned Judge ruled, however, that the plaintiff was entitled to make his application *ex parte*, and refused to hear counsel against the motion.

Notice that the injunction had been granted, and notice of motion, returnable on the 18th of February, 1897, to continue it to the trial or other determination of the action, was at once given to the defendants, but the defendant Bruce attended before His Honour Judge Dartnell and the recount was proceeded with, and Graham was declared elected, and the defendant Bruce made his return to the Clerk of the Crown in Chancery forthwith. On the 18th of February, 1897, the application to continue the injunction came on for hearing before ROBERTSON, J., and counsel for all the defendants appeared and asked that the order of the 15th of February, 1897, should be discharged. When the facts, however, were stated to the learned Judge he declined to make any order.

The plaintiff then moved to commit the defendant Bruce, who then appealed from the order of the 15th of February, 1897, and also from the refusal of the learned Judge on the 18th of February, 1897, to set aside that order, and the appeal was argued before BURTON, OSLER, and MACLENNAN, JJ. A., on the 22nd and 23rd of March, 1897.

*W. Macdonald, L. G. McCarthy, and R. A. Grant*, for the appellant. The learned Judge had no jurisdiction to enjoin the returning officer from proceeding with the recount directed by His Honour Judge Dartnell, for it is a well settled principle that the House of Commons has exclusive control over everything relating to the election of its members: *Barnardiston v. Soame*, 6 Howell's State Trials, 1063. That was an action for damages, and



**Argument.** to attempt to enjoin is to go much further. See also May's Parliamentary Practice, 10th ed., p. 50; 2 Rogers on Elections, 17th ed., pp. 77, 144. Except in so far as this principle has been varied by statute it still holds good. It is true that in *Ashby v. White*, 1 Sm. L. C., 10th ed., 231, it was held that an elector might maintain an action against a returning officer for refusing his vote, but that turns on the ground that the right to vote is a right of property, and the protection of a right of property is very different from an attempt to control the action of the officers of the House. *Bradlaugh v. Gossett*, 12 Q. B. D. 271, is very like this case. The regulation of internal proceedings was in question there, but the principle is the same. By R. S. C. ch. 11, secs. 3 and 4, the Canadian House of Commons is given the same rights, privileges and immunities, as the English House of Commons, and it is clear, therefore, that the House of Commons has exclusive jurisdiction in this case: see *Valin v. Langlois*, 5 App. Cas. 115; *In re Centre Wellington*, 44 U. C. R. 132. *Re Simmons and Dalton*, 12 O. R. 505, is to some extent in the respondent's favour; but in *Re North Perth*, *Hessin v. Lloyd*, 21 O. R. 538, this case is disapproved of and it is also distinguishable, as the right to vote was there in question. The principle is the same in the United States: Throop on Public Officers, secs. 842, 843. Even if there is jurisdiction at all, the injunction goes too far and prevents the returning officer from complying with the duty imposed upon him by the statute. Moreover, the appellant was entitled to be heard in opposition to the application, which was granted on insufficient material.

*Aylesworth*, Q. C., for the respondent. The affidavit filed on the application for an injunction shews that Noble did not apply for a recount in good faith, but that there was a fraudulent attempt to deprive the plaintiff of the right to a recount before the proper officer. The injunction was granted for only three days, to keep things in suspense, and this is an attempt to evade responsibility for disregard of an order already spent. There is nothing to appeal

from. The appellant has done what he was ordered not to do, and the Court should follow the course taken in *In re Lilley and Allin*, 21 O. R. 424, 19 A. R. 101, and should refuse to entertain the appeal. Setting aside the order will be no answer to the application to commit for contempt; while the order was in force, it should have been obeyed: *Allen v. Edinburgh Life Assurance Co.*, 26 Gr. 192; *Lee v. Bude and Torrington R. W. Co.*, L. R. 6 C. P. 576; *Moir v. Huntingdon*, 19 S. C. R. 363. At any rate this objection can be raised in answer to the motion to commit, and that is the proper time and place for disposing of it. However, on the merits the right of the respondent is clear. The interim injunction affects the returning officer in two respects only, both purely ministerial, namely, attending before the Judge with the ballots, and sending them to the Clerk of the Crown in Chancery. The returning officer had received notice of the appointment before His Honour Judge Mahaffy, and the injunction restrained him from violating the duty cast upon him by R. S. C. ch. 8, sec. 64, sub-sec. 8. He was in no way interfered with in the performance of the duties imposed upon him by the House of Commons, and the privileges of that House are not in question. The legal right of the plaintiff has been interfered with, and an action for damages will lie, and wherever an action will lie there can be an injunction to prevent threatened interference with the right. The principle of *Ashby v. White*, 2 Sm. L. C., 10th ed., 231, applies. *Barnardiston v. Soame*, 6 Howell's State Trials, 1063, is of no importance or application, and it may be noted that the right there denied was afterwards conferred by 12 Anne ch. 1, sec. 15. The same official may act at one time judicially, and at another time ministerially: *Ferguson v. Kinnoull*, 9 Cl. & F. 251; and for breach of ministerial duty may be made responsible: *Pickering v. James*, L. R. 8 C. P. 489. The nature of the privileges of the House of Commons is fully discussed in *Burdett v. Abbot*, 14 East 1, 108; *Stockdale v. Hansard*, 9 A. & E. 1, and the extent of the right of the Courts to interfere is there pointed

Argument.

**Argument.** out. There can be no interference with the management of the internal concerns of the House, but it is very different when elective rights are in question and it is by no means clear that the Canadian House of Commons has the same privileges as the English House of Commons: see Broom's Constitutional Law, 2nd ed., p. 799 *et seq.*, particularly p. 981 (*n*). The *Centre Wellington* case went off on the ground that there was another remedy and, therefore, no necessity for the exercise of the extraordinary jurisdiction invoked. The *North Perth* case was a summary application to prohibit a judicial officer and that was entirely a matter of discretion. The distinction is pointed out in *Re Simmons and Dalton*, 12 O. R. 505, and that is a direct authority in the respondent's favour. The Court has inherent jurisdiction to prevent a wrong of this kind. The American cases are of no value for there the courts have merely statutory jurisdiction. The material before the learned Judge was sufficient to justify the order.

*W. Macdonald*, in reply.

June 30th, 1897. OSLER, J. A.:—

In *In re Lilley and Allin*, 21 O. R. 424, 19 A. R. 101, where the Divisional Court had directed a mandamus to go to the revising officer, commanding him to hear and dispose of objections to the right of certain persons to be placed on the voters' list, this Court dismissed an appeal from the judgment, on the ground that nothing remained to be decided, the officer having obeyed the writ and determined, so far as he could do so and subject to the appeal from his decision to the County Judge, the rights of the voters in question. Nothing that we could have done in affirming or reversing the judgment could have altered that, or affected the status of the voters or the right of appeal to the County Judge. No costs had been awarded to any one; nothing more depended upon the order, and as any judgment of ours must have been wholly ineffectual for any purpose we dis-

missed the appeal or made no order, and I abstained from expressing an opinion upon any of the points in controversy.

Judgment.

OSLER,  
J.A.

The case before us bears no resemblance whatever in this respect to that case. It is true that the order appealed from was disregarded and can now never be complied with, and so far, therefore, the defendant is not affected by it whether it be reversed or affirmed, but other proceedings have arisen out of it, the determination of which may depend upon the question whether the learned Judge who made it had any authority to make it at all, or upon whether it has been irregularly or improperly drawn up: *Newell v. Newell*, [1896] W. N. 160 (2).

It has also been made a ground of objection to the order that the learned Judge refused to hear counsel who desired to oppose the *ex parte* application made therefor, and further, that he refused to discharge it when the matter came before him on the motion to continue the injunction. All these are circumstances which differ the case before us from the case referred to, and affirm the propriety of entertaining the appeal.

And first, I am of opinion that it was clearly the duty of the learned Judge to have heard counsel, who appeared to oppose the granting of the order *ex parte* and to point out that he had no jurisdiction. The very reason on which the Court proceeds in making an order for an injunction *ex parte* is that time will not serve to give notice to the party intended to be affected by it. It is a mere interim order proceeding upon the necessity of the case as made to appear to the judge, and is granted for no longer a time than will serve to enable the party obtaining it to move to continue it on notice to the party affected. If such party is prepared to oppose it on the material presented by the applicant when moved *ex parte* I can conceive of no reason why he should not be heard. Secondly, the order as drawn up appears to me to be irregular in form, at all events as to the third paragraph. Not only does it restrain the appellant until the 18th of February, or

Judgment.

OSLER,  
J.A.

until further order, from attending before Judge Dartnell with the parcels containing the ballot papers used at the election, or delivering the same or any of them to him, but it goes on to determine the question intended to be raised in the action as to which of the judges, the County Judge or the District Judge, was the proper officer to make the recount by prohibiting the appellant absolutely from making any return to the Clerk of the Crown in Chancery of the result of the election until he should have received from District Judge Mahaffy a certificate of the result of the recount of the ballots to be had before him.

Then upon the main question argued, I wish to express my entire concurrence with the principle on which the case *In re Centre Wellington*, 44 U. C. R. 132, was decided, namely, that the recount by a County Judge of votes at a parliamentary election is a matter belonging to Parliament alone, and the proceedings before him are not cognizable by the High Court except in so far as Parliament has by legislation conferred jurisdiction. This case is quoted with approval in *Ellis v. The Queen*, 22 S. C. R. 1, by Mr. Justice Fournier: and see R. S. C. ch. 8, sec. 64; 54-55 Vict. ch. 19, sec. 11 (D.).

I agree with what is said by Meredith, J., in *Re North Perth, Hessin v. Lloyd*, 21 O. R. 538, 545, that by the Act just referred to Parliament has recognized the *Centre Wellington* case as a true exposition of the law. He speaks of it as "legislation which seems, by expressly giving jurisdiction to this Court under the circumstances and for the purposes under consideration in that case, to more plainly indicate that, where jurisdiction is not expressly conferred, it was not intended that this Court should exercise any of the rights or powers of the High Court of Parliament in any proceedings under the Acts respecting the representation of the people in Parliament."

I cannot regard the Act of 1891 as covering the present case, or as conferring jurisdiction upon a judge of the High Court to restrain the exercise by the County Judge of the power conferred upon him by the Act, section 64, merely

because the District Judge upon whom similar powers are conferred may have already attempted to exercise them. If two appointments are issued it is in my opinion for Parliament to decide whether the returning officer can be said to be in any the least respect malfeasant if he obeys either one of them, and more particularly that one which may enable him to make his return to the Clerk of the Crown in Chancery at the earliest time.

Judgment.

OSLER,  
J.A.

The appeal should, in my opinion, be allowed, and the order for the injunction discharged with costs.

MACLENNAN, J. A. :—

I agree in the judgment of my brother Osler in every respect, with this reserve, that I am not satisfied that the High Court has not jurisdiction in mandamus over even an officer appointed by virtue of either a Dominion or Provincial Act relating to elections, to compel him to discharge the duty imposed upon him by statute. The judgment in *In re Centre Wellington*, 44 U. C. R. 132, has never been reviewed in this Court, and I do not think it is necessary for determining the present appeal to express any opinion upon it.

I think that the appeal should be allowed, and that the order should be discharged.

BURTON, C. J. O. :—

Without expressing any opinion as to the power of the Judge to make the original order, I find the greatest difficulty in dealing with the question in appeal. What is to be our judgment? Whatever the validity or invalidity of the original order, it has now expired by effluxion of time, and nothing we can do can set it up again, and we can scarcely be expected to deal with the abstract question of whether it was originally properly granted when our conclusion can result in nothing. It seems to me to be only necessary to state the facts to shew that it is not a case in

**Judgment.** which it is desirable to interfere, although I am inclined  
**BURTON,** to distrust my own judgment in consequence of my  
**C.J.O.** learned brothers taking a different view.

I cannot very readily recall a case similar to the present, but assume a case in which the question for decision in the Court below had been whether the claimant was entitled to an estate *pur autre vie*, and a decision adverse to the claimant had been arrived at, but before the case was argued in appeal the life on which the estate was claimed to be held dropped, would any Court entertain the abstract question of whether the judgment below was correct or not? And how does that differ in principle from this case? It has been suggested that applications are pending in some other Court for committal for contempt of some of the parties who disobeyed the injunction, and that an opinion of this Court might render those proceedings unnecessary. I can only say, speaking for myself, that I should consider any interference by anticipation with the exercise of the judicial discretion of another Court very undesirable, if not discourteous, and I incline to think unprecedented, and I do not feel disposed to make a precedent.

That Court is equally competent with ourselves to decide the question of jurisdiction, and if their decision should ever come before us for review, we shall, at all events, have the advantage of considering the reasons which have influenced their decision.

The Supreme Court in *Moir v. Huntingdon*, 19 S. C. R. 363, refused to entertain an appeal on its being mentioned to them that the by-law which was the subject of the judgment below had been repealed. In the short report of that case, it is stated that the Court will not entertain an appeal from any judgment for the purpose of deciding a mere question of costs, which may be subject to the qualification referred to in *Fleming v. Toronto*, 19 A. R. 318, in this Court.

I think, with great respect, that the fact that the order was a spent order applies equally to the other points raised, and would be an answer to any objection to the refusal to

hear counsel who appeared to oppose the granting of the order *ex parte*, although I concur with my learned brothers in the view they take of a judge's duty in such a case, and although it would probably have been fatal to the validity of the order if raised during its currency. In the cases referred to by my brother Osler we thought we had no jurisdiction, but some of us, at the earnest request of both parties, stated our opinions, an error I am not likely to repeat, and I feel a great reluctance to express any opinion upon a point which I think is not before us.

It is because I do not see what order we could properly make under the circumstances, and because I have a firm conviction that it is no part of our duty to anticipate the decision of the tribunal whose duty it is to deal with the question of contempt, that I think we ought not to entertain this appeal.

Judgment.

BURTON,  
C.J.O.

*Appeal allowed, BURTON, C.J.O., dissenting.*

R. S. C.

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## IN RE CENTRAL BANK OF CANADA.

## HOGABOOM'S CASE.

*Company—Winding-up Act—Payment out of Court—Right of Receiver-General to Compel Repayment—Court Funds—Payment to Person not Entitled—Jurisdiction of Court to Compel Repayment—R. S. C. ch. 123, secs. 40, 41—55 & 56 Vict. ch. 28, sec. 2 (D.).*

Where the liquidators of an insolvent bank have passed their final accounts and have paid into Court the balance in their hands, and that balance is by inadvertence paid out of Court to a person not entitled to it, the Receiver-General has such an interest in the fund that he may, even before three years from the time of payment in have expired, apply to the Court for an order for repayment into Court of the fund.

The Court has also inherent jurisdiction to compel the repayment into Court of money improperly obtained out of Court.  
Judgment of STREET, J., reversed.

**Statement.** THIS was an appeal by the Receiver-General of Canada from the judgment of STREET, J., refusing an application to compel the executors of the Hogaboom estate to pay into Court or to the applicant \$3,635.13, paid out of Court to them under two orders made by ARMOUR, C. J., on the 4th of January, 1895, and 16th of May, 1896. The application was refused by STREET, J., on the 14th of November, 1896, on the ground that the Receiver-General had no *locus standi*. Leave to appeal from this order was granted by MEREDITH, J., and leave to appeal from the order granting leave was refused by FERGUSON, J.: See 17 P. R. 370 and 395.

The money in question was part of the balance in the hands of the liquidators of the Central Bank of Canada at the time of the passing of their final accounts. They paid the balance into Court, and were on the 15th of October, 1892, discharged, the creditors of the insolvent bank having up to that time received ninety-nine and two-thirds cents on the dollar of their claims.

Mr. George S. Holmested, Accountant of the Supreme Court of Judicature for Ontario, was then appointed by the Court liquidator, without salary, and some small claims were paid under orders from time to time made, leaving in

Court the amount in question in this appeal. Hogaboom Statement.  
had purchased certain of the assets of the insolvent bank,  
and after his death, his executors, on notice to Mr. Holm-  
sted, obtained the orders in question.

The appeal was argued before BURTON, OSLER, and  
MACLENNAN, JJ.A., on the 11th and 12th of March, 1897.

*Moss, Q. C., and F. E. Hodgins*, for the appellant.

*S. H. Blake, Q. C., and W. R. Smyth*, for the respondents,  
the executors of the Hogaboom estate.

*George S. Holmsted*, liquidator, in person.

Subsequently an application was made by the appellant  
for leave to put in further material, and the same counsel  
appeared.

June 30th, 1897. BURTON, C. J. O. :—

A preliminary objection was taken that the appeal was  
not properly before us, no sufficient leave having been  
granted as required by section 74 of the Winding-up Act,  
R. S. C. ch. 129.

This objection, however, proceeds upon a misapprehen-  
sion that Mr. Justice Street had already refused leave to  
appeal, which is very far from being the case; on the con-  
trary, the leave was given by Mr. Justice Meredith with  
the full concurrence of Mr. Justice Street; that learned  
Judge was of opinion that the Receiver-General had no  
*locus standi*, and on that ground, therefore, held that he  
had no alternative but to dismiss the petition.

Fortunately applications of this nature are not of fre-  
quent occurrence, and the case itself involves many diffi-  
culties. I have been at some pains to fully investigate the  
facts which have led to the present appeal, and they appear  
to be briefly as follows :—

[The learned Chief Justice stated the facts and contin-  
ued :]

From the foregoing statement it is apparent that the

**Judgment.****BURTON,  
C.J.O.**

amount in question formed no portion of the unrealized assets of the bank, which were included in Hogaboom's tender. At that time the amount had been realized, and was in the liquidators' hands, and would presumably have been included in the final dividend had not the liquidators feared that they ran some risk in doing so; but it is clear beyond all question that Hogaboom had no claim to it or any part of it.

The learned Chief Justice of the Queen's Bench Division was, however, induced to make an order on the 4th of January, 1895, directing the sum of \$2,994.88 with accrued interest to be paid to the estate of Hogaboom, on an affidavit of Charles Macdonald, which was not warranted upon the facts which I have detailed.

The general wording of the order of the Chancellor vesting the unrealized assets in Hogaboom, has been used to convey to the learned Chief Justice the impression that the purchase was not confined to the unrealized assets mentioned in the tender, but to all the assets of the estate, and that these moneys had not been realized at the time of the purchase.

It is difficult to understand how any one could have understood that these moneys were included in the purchase; but it is clear that they were not so included, and that the Hogaboom estate had no claim to them. The order of the 16th of May, 1896, was granted on the same material, and on the representation then made that the money was not required for the payment of outstanding cheques as previously supposed.

It appears to me to be clear upon these facts that a great miscarriage of justice has taken place, and that a sum of money to which the estate of Hogaboom has not a shadow of a claim, has been improperly paid out of Court to his executors.

It was said on the argument that insinuations had been made in reference to this transaction which had no foundation, and that a thorough investigation would shew that the moneys had been properly paid out. I have, there-

fore, taken a great deal of trouble to go through the whole matter, and cannot say that I have the slightest doubt that the Hogaboom estate had no claim to any portion of these moneys.

Judgment.

BURTON,  
C.J.O.

From the time of the discharge of the liquidators and the appointment of the Accountant of the Supreme Court nominally as liquidator, but without salary and without security, I adopt the facts stated in the judgment of my brother Maclellan, and his reasoning upon those facts, and agree in his conclusions.

Happily, transactions of this nature are very rare in this Province and in the mother country, and it is not surprising, therefore, that there is a dearth of precedents as to the course of proceeding under such circumstances. Whilst, therefore, I agree with the other members of the Court as to the right of the Receiver-General to move to rescind the orders referred to, I am strongly of opinion that an order can be made by the Court *ex mero motu*, whenever the fact is brought to its notice.

The Court is in the position of a trustee of the particular fund in question, and of each fund in Court separately. If that fund is removed by fraud or error, the party entitled would be, so far as I can see, without remedy—there is no general fund to which he could resort. It becomes the duty of the Court, therefore, to use every means in its power to enforce the replacement of that trust fund so soon as the fact is discovered; if, therefore, there is any question of the status of the Receiver-General, I think this Court has inherent authority to instruct its officers to take proceedings for having the wrong, which has been done in this case, remedied, and to order the money to be repaid into Court with interest, and it would merely be a change in procedure. If for any reason there is a question of the status of the Receiver-General, I cannot believe the law is so defective that any doubt can exist as to the power of the Court to prevent a misapplication of the funds entrusted to its care.

Judgment. OSLER, J. A. :—

OSLER,  
J.A.

I agree. I think that the Receiver-General has sufficient interest in the preservation of the fund to entitle him to apply for its repayment ; and I also think that the Court, under the circumstances disclosed here, has inherent jurisdiction to compel repayment.

MACLENNAN, J.A. :—

[The learned Judge dealt fully with the facts, coming to the conclusion that the funds in question did not belong to Hogaboom, and then continued :]

The question remains whether the Minister of Finance and Receiver-General has any right to complain of the orders in question. For the purpose of determining this question sections 40 and 41 of the Winding-up Act, R.S.C. ch. 129, and also section 2 of the amending Act, 55 & 56 Vict. ch. 28 (D), have to be considered. Section 40 provides that the liquidator shall, within three days after the final winding-up, deposit in the bank appointed any money not required for any purpose authorized by the Act, with a sworn statement, and section 41 provides that the money shall be left on deposit for three years, subject to be claimed by those entitled thereto, and shall then be paid over with interest to the Minister of Finance and Receiver-General, and if afterwards claimed shall be paid to the persons entitled thereto. Section 2 of the amending Act varies the provisions of sections 40 and 41, and provides for the discharge of the liquidators when the proceedings reach a certain stage, and for the payment of the balance remaining in his hands into Court or to such officer or person as the Court may direct, to be distributed by the direction of the Court among the persons entitled thereto in the same way as if distribution were being made by the liquidator. It was under this section, 2 that the money was paid into Court. The liquidators and their sureties had been

discharged, and the Court had, apparently of its own Judgment. motion, appointed the Accountant of the Supreme Court to MACLENNAN, act as liquidator. There is no express authority for such J.A. an appointment, but doubtless it was made in order more effectually to safe-guard the fund and ensure its proper distribution as provided by section 2. The order does not expressly authorize Mr. Holmested to represent either the creditors or the shareholders of the bank for any purpose, but merely says he is appointed for the purpose of distributing the balance paid into Court. Without some such authority, I do not see how he could represent either creditors or shareholders, or how a notice to him of the motion made by Hogaboom's executors could bind them or any one else. When the money was paid in it clearly belonged to the creditors, for they had not been paid in full. If they did not choose to claim it it could be claimed by the shareholders; section 2 does not supersede sections 40 and 41; and reading them together I think the payment into Court under section 2 must be regarded as a substitution for the payment into the bank as required by section 40. While in the bank it would still be subject to be claimed as provided by section 41, and so by section 2 it is also subject to be claimed, after payment into Court; and I am of opinion that after it had been in Court for three years the Minister of Finance and Receiver-General would be entitled to have it paid over to him under section 41. When the first application was made the fund had been in Court for over two years; and when the second was made, the balance had been there for more than three years. When the first order was made the Receiver-General had an inchoate contingent right, which would become absolute in October, 1895, in case the money was not in the meantime claimed by creditors or shareholders; and when the second order was made that right had become absolute, and it was absolute when the motion was made before Mr. Justice Street.

In my opinion it is clear that the Receiver-General had such an interest when both orders were made as to entitle him to notice of the applications, and that the

**Judgment.** orders made in his absence were not binding on him ; that being so, it follows that he had a right to move to rescind them, and to have the money repaid into Court, as soon as he became aware of what had been done.

**MACLENNAN,**  
**J.A.**

I am, therefore, with great respect, of opinion that the appeal should be allowed, and that the orders referred to should be discharged, and that the respondents should be ordered to bring the money paid out to them thereunder into Court with interest, and that they should pay the costs both here and below.

*Appeal allowed.*

R. S. C.

#### HALL V. STISTED SCHOOL TRUSTEES.

*Public Schools—Guardian—"Boarding-out Agreement"—54 Vict. ch. 55, sec. 40, sub-sec. 3 (O.).*

The custodian of a child under a "boarding-out agreement" to clothe, maintain, and educate him, is not his guardian within the meaning of sub-sec. 3 of sec. 40 of the Public Schools Act of 1891, 54 Vict. ch. 55 (O.), and the trustees of the school section within which the custodian resides need not provide school accommodation for the child.

Judgment of FERGUSON, J., 28 O. R. 127, affirmed.

**Statement.** THIS was an appeal by the plaintiff from the judgment of FERGUSON, J., reported 28 O. R. 127, where the facts and arguments are stated, and was argued before BURTON, OSLER, and MACLENNAN, JJ. A., on the 10th of March, 1897.

*E. Coatsworth, and F. E. Hodgins, for the appellant.*  
*Shepley, Q. C., for the respondents.*

June 30th, 1897. BURTON, C. J. O. :—

I am reluctantly compelled to come to the conclusion that the judgment must be affirmed on the short ground that the plaintiff is not brought within sub-section 3 of

section 40 of the Public Schools Act of 1891, 54 Vict. ch. 55 (O.), as being a child whose parents or guardians were resident within the school section. The next friend of the plaintiff, with whom he lives, though resident within the section, is not, in my opinion, his guardian within the meaning of the statute.

Judgment.  
BURTON,  
C.J.O.

Nor is the argument advanced, in my opinion, by any thing contained in the Truancy Act, 54 Vict. ch. 56 (O.). It does not profess to extend or enlarge the right conferred by the Public Schools Act, or to give any additional right; and no pupil can, I imagine, be brought within the Truancy Act unless it can be shewn that he was entitled to the exercise of a right which might be enforced by virtue of the Public Schools Act.

It may be that the next friend might have been legally invested with the character of guardian under R. S. O. ch. 142, had that statute been invoked and acted upon, but if there is any doubt upon the subject the Legislature should, I think, promptly interfere to prevent the evil effects of such action as was contemplated here.

I am unable to agree with the learned Judge below that there is no foundation for the suspicion that under the pretence of complying with the law the action of the board was taken with the view of excluding from the school the boys of the Barnardo Homes. I may say that both from the pleadings and the evidence I have come to a clear conclusion that the whole action of the board and the parties by whom they were elected was with that object in view, and I venture to express a hope that some action may be taken by the Legislature to prevent so undesirable a result as the inflicting upon the community the terrible evil of bringing up these unfortunate waifs without the means of education, and thus converting into an unmitigated curse an emigration which under kindly and prudent legislation might be a great blessing both to the children and to the country at large.

I am unable to see my way to the allowance of this appeal, but I do not think it is a case for costs.



Judgment. OSLER, J. A. :—

OSLER,  
J.A.

This is an action brought by the plaintiff Frederick Hall, by his guardian and next friend George Spiers, against the Board of Public School Trustees of Union School Section No. 2 of the township of Stisted, for an order requiring the defendants to allow the plaintiff to attend the proper school in the school section, and to restrain the defendants from preventing him from attending thereat; and also for an order requiring the defendants to make, if necessary, such provision as will afford proper accommodation to enable the plaintiff to attend school in the said school section.

This defence in substance is that the plaintiff is not a child who is entitled to attend the school in the school section in question, and that the defendants have provided school accommodation for all the children therein for whom they are by law required to provide it.

The action was tried before Ferguson, J., at Bracebridge, in the month of July, 1896. Judgment was subsequently delivered dismissing it with costs. The plaintiff now appeals.

The question raised on this appeal is one of considerable public importance as regards the duties of school trustees in respect of children in the plaintiff's position in a rural school section. The facts are fully stated in the judgment of the learned trial Judge, and I will only refer to them so far as may be necessary to explain my view of the law.

In 1894 the plaintiff, who was then an inmate of the admirable charitable institution known as the Barnardo Homes, was sent out to this country and placed in charge of Dr. Barnardo's agency here, managed by Mr. Owen. He was then about twelve years old. Mr. Owen, in the month of September, 1894, placed him in the care of George Spiers, the next friend in this action, a resident of the township of Stisted, upon the terms of what is called "a boarding out undertaking" set forth at length in the judgment below. The effect of this instrument, which

is signed by Spiers only, is that Spiers in consideration of \$5 per month to be paid to him by Owen, engages with the latter to receive the plaintiff as a member of his household, to bring him up carefully, to provide him with sufficient food and clothing, and to secure his regular attendance at school, church, etc., etc. Spiers further engaged to communicate once every three months with the agent of the Homes regarding Hall's health and well being, and to afford every facility to any duly authorized representative of the Homes, who might visit him, to make such inspections as he might consider necessary. He further agreed not to transfer the plaintiff to any one else without the agent's sanction, and in the event of his leaving him without his consent that he would immediately notify the agent; and he lastly engaged promptly to give up possession of the plaintiff to any duly authorized person representing Dr. Barnardo's Homes.

Judgment.

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OSLER,  
J.A.

During the year 1895 the plaintiff attended the school without objection. In January, 1896, the trustees refused to admit the plaintiff to the school. There were fourteen or fifteen other boys resident in the township under similar boarding out undertakings and they were also refused admission to or were ejected from the school. Exclusive of boys of this class the children of school age whose parents or guardians were resident in the section were forty-six in number and the schoolhouse had accommodation (according to the school regulations) for thirty-two only, that is to say, as nearly as possible two-thirds of the former number.

The contention of the defendants is that they have done all that the law requires of them in providing school accommodation, having regard to the number of children whose parents or guardians are residents of the school section, and that the plaintiff and other children resident in the section under these boarding out undertakings are not by law to be computed with or added to that number, they not being children whose parents or guardians are resident in the section.

Judgment.

OSLER,  
J.A.

The Public Schools Act, 1891, 54 Vict. ch. 55 (O), a consolidation and revision of R. S. O. ch. 225, and its amendments, was the Act in force when this action was brought. By the 9th section it is provided that all public schools shall be free schools and that any person between the ages of five and twenty-one years shall have the right to attend some school. See now the Public Schools Act of 1896, 59 Vict. ch. 70, sec. 6 (O.). In rural school sections it is nevertheless clear that trustees were not bound to provide accommodation for all the children of school age in the school section.

The accommodation was intended to be sufficient for the probable average attendance, not of all "the actual resident" children in the section, as was formerly the case, R. S. O. ch. 225, sec. 40, sub-sec. 2, but of those children whose parents or guardians were residents of the section as ascertained by the census taken by the municipal council for the next preceding year. "It shall be the duty of the trustees and they shall have power to provide adequate accommodation and a legally qualified teacher or teachers for two-thirds of the children between the ages of five and sixteen years, whose parents," etc., etc.: School Act of 1891, sec. 40, sub-sec. 3. See now the Public Schools Act of 1896, secs. 11 (3) and 62 (3). The Act made no provision for taking the census referred to, omitting the clauses of the Consolidated Act on that subject. The only census was that required to be made by the Truancy Act of 1891, 54 Vict. ch. 56, sec. 11 (O.), of the name, age and residence of every child between the ages of eight and fourteen years, resident in the municipality, and the name and residence of its parent or guardian. The Assessment Amendment Act of 1893, 56 Vict. ch. 38, sec. 2 (O), now, however, provides that assessors shall make an annual census of all the children in the municipality between the ages of five and twenty-one years.

It appears to me, therefore, to be clear that trustees were only bound to provide accommodation for the number, proportion and class of children mentioned in section

40 (3); that is to say, children whose parents or guardians were residents of the section.

Judgment.

OSLER,  
J.A.

It does not appear whether the plaintiff's parents are living; they certainly were not residents of the section. Spiers is not his parent, but it was strenuously contended that he is his guardian. I agree with the learned Judge that we are not justified in giving that word anything but one of its ordinary legal meanings and that in order to be within the section Spiers must be shewn to be a guardian of some character or description recognized by law. He is not a guardian appointed under the Act respecting Infants, R. S. O. ch. 137, sec. 10. It is equally clear that he is not one within R. S. O. ch. 142, an Act respecting Apprentices and Minors. For anything we know to the contrary, the manager or agent of the Barnardo Home, as a person having the care or charge of a minor, might by indenture have constituted Spiers guardian of the plaintiff under that Act: section 2. The difficulty is that he has not done so. Spiers is simply the custodian of plaintiff for the Home, having given an acknowledgment for him and an undertaking to perform certain duties towards and to re-deliver him to the Home on request. He is a person with whom the child is residing and occupies no other relation towards him that I can see, and therefore the child is not one of the number for whom the trustees are bound to provide school accommodation, more than for children of non-residents—see sections 9 (2), 172 (1), or for the remaining one-third of children of resident parents or guardians.

Certain provisions of the Truancy Act, 54 Vict. ch. 56, (O.) were relied on as shewing that the word "guardian" ought to receive a more extensive meaning than has been given to it. I do not think that they assist the plaintiff. The words "parents or guardian," are used throughout the School Act as expressing the status of those having authority over the child. The same expression is found in section 2 of the Truancy Act, which provides that all children between eight and fourteen years of age shall attend school for the full term during which the school of the section in

Judgment.

OWLER,  
J.A.

which they reside is open each year, unless excused for one of the reasons specified in section 4, and that parents or guardians having legal charge of such children shall be subject to certain penalties if they fail to send them to school regularly. Section 3 then provides that a person "who receives into his house a child of any other person, under the age of fourteen years, and who is resident with him, or in his care or legal custody," shall be deemed thereby to be subject to the same duty with respect to the instruction of such child during such residence as a parent.

One of the reasonable excuses for non-attendance is, that there is no accommodation in the school which the child has the right to attend: section 4 (4).

The right to attend school referred to in this section and in section 9 of the Public Schools Act is not correlative with a duty on the part of the trustees to provide accommodation for all who have such right. That duty is limited, as I have shewn. When the accommodation exists, then it is the right and duty of each child between eight and fourteen years of age to attend school, even where such child is one who need not be taken into account in providing it as being a child who is not living with a parent or guardian but merely residing with some one in the school section. I think that is the effect of the 2nd, 3rd and 4th sections of the Truancy Act and the 9th section of the Public Schools Act. That is the situation of the plaintiff. He had the right to attend this school, and had there been accommodation for him I am of opinion that the defendants would have been wrong in refusing to permit him to do so. But, as the learned Judge has found, there was in fact no accommodation. The trustees had provided accommodation for the required two-thirds of those whom they were bound to take into account and the school was attended by as many children exclusive of the plaintiff as the accommodation was sufficient for. Under the circumstances the trustees cannot be compelled to provide more.

Were there no means by which children circumstanced as the plaintiff is could be placed on the same footing as other

children as regards educational privileges, I should consider this a most deplorable result, and one calling for a prompt amendment of the law. But as there seems no reason to suppose that a guardian by indenture would not be a guardian within the meaning of the Public Schools Act, it rests with those who have the care or charge of a minor to give him by that means, under the Apprentices Act, or possibly under more recent legislation, the necessary status. Section 14 of an Act of last session, 60 Vict. ch. 53(O.), has evidently been framed with this view, providing that every society, agent or person having the custody of any child brought into the Province, shall be entitled to send such child to the public or separate schools of the municipality, or section schools in which the child resides, in the same manner as the child of a ratepayer; and that every such society, agent or person shall be subject to the provisions of the Truancy Act.

Judgment.

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OSLER,  
J.A.

Whether this enactment touches the real difficulty may perhaps be questioned. The best and most effective way to have met it would have been to amend section 62, subsection 3, of the Act of 1896, and to make it the duty of the school trustees, as it formerly was under section 40, subsection 3, of R. S. O. ch. 225, to provide adequate accommodation for two-thirds of the actual resident children, without saying whose children they are, between the ages of five and twenty-one as ascertained by the census of the preceding year. This would place all children in the municipality on the same footing, the accommodation being based on two-thirds of the whole number, whether children of ratepayers or not.

As the case now stands I think we can only affirm the judgment.

The appeal must be dismissed with costs.

MACLENNAN, J.A. :—

I agree.

*Appeal dismissed.*

R. S. C.

## IRWIN V. THE TORONTO GENERAL TRUSTS COMPANY.

*Executors and Administrators—Administrator with Will Annexed—Power to Compromise—Dower—R. S. O. ch. 110, sec. 31.*

An administrator with the will annexed has no authority as such to compromise dower or other claims by assigning to the claimant a portion of the real estate of the deceased.

**Statement.** THIS was an action brought by Richard Irwin against the Toronto General Trusts Company as administrators with the will annexed of William Irwin, who died on September 28th, 1895, and Martha Irwin, widow of William Irwin. The plaintiff set up in his statement of claim that he was a devisee under the will: that Martha Irwin had elected to take her dower, and that the Toronto General Trusts Company had refused to assign her dower to her, though requested by the plaintiff so to do, but had, about June 24th, 1896, entered into an agreement with her to convey to her a house, part of the estate of the deceased, and known as No. 39 Broadview avenue, in settlement of her claim for dower: that this agreement was come to without the plaintiff's knowledge, and he protested against it: that the company nevertheless threatened and intended to carry it out: that, as he submitted, they had no legal right to enter into any such agreement, and it was improvident, and injurious to his, the plaintiff's interests as devisee, and he claimed that it should be cancelled, and the company enjoined.

The company in their defence set up facts to shew that the agreement with the widow, which was not only in settlement of her right of dower, but also of a claim of her's as creditor of the estate for \$970, was in the best interests of the estate: and submitted that by virtue of the provisions of the Devolution of Estates Act they were the tenants of the freehold, and empowered by the Dower Act to compromise with the widow regarding her dower: that by virtue of the Devolution of Estates Act the lands

devolved on them as personal property, and that they Statement. were possessed of such powers regarding real estate as were granted them under the Executors and Trustees Act regarding personalty, and therefore entitled to exercise their discretion in disposing of claims upon the real estate whether as to dower or other claims, as it might appear to them to be in the interest of the estate: that if this was not so, the Court should find as a fact that the settlement was in the interest of the estate, and order that the same should be carried out: that the costs of administration and claims of creditors could not have been realized without resort to a sale of the whole estate, and that the plaintiff's remedy, if any, was in damages for any loss he might be able to shew was sustained by the estate by the disposal thereof as proposed by the company over the amount which might be realized on a sale subject to the widow's dower when assigned, and that the action was prematurely brought.

The action was tried at the Toronto non-jury Sittings, before ROSE, J., on September 21st, 1896, who gave judgment, dismissing the action with costs, and in the course of his judgment, said:—

“ I think it is beyond doubt, I think one would readily come to the conclusion that it is beyond question, that trustees may sell part of the estate and come to an agreement with the widow to pay her a gross sum in lieu of dower, so that they may sell free from dower. Assuming *bona fides*, assuming reasonableness which would not give rise to the suspicion of want of *bona fides*, I do not see any objection to selling. Out of the proceeds of the sale the widow might be paid a gross sum; of that at present I have no doubt. Then it was open for these trustees to arrange with the widow, as to what sum might be paid her in gross, so that the estate might be well administered. It was perfectly manifest from a prior attempt at sale, that this property could not be sold subject to the widow's claim for dower. It did not need the attempted sale, I



Judgment.

ROSE,  
J.

think, to make that reasonably manifest. The trustees, therefore, had the property in their hands with a claim against it, which had to be arranged before they could sell, before they could convert the land into money for the purpose of paying claims against the estate. What course then was open to the trustees? We find here a widow fifty-two years of age. We have an estate, say worth \$4,000." [His Lordship then stated facts and figures leading to the conclusion that the proposed settlement with the widow was a provident one in the interests of the estate, and proceeded:]

I think the settlement is provident; I cannot say it is improvident. It is my duty to look very closely into the administration of an estate, to see that justice is done between the parties; and that is the conclusion I have arrived at, that the settlement was a provident one. Then the sole question that remains is, was this provident adjustment beyond the power of the executors? If they chose to do it in this way, giving the widow a home in settlement of her entire claim, had they power to do so? Will the Court sanction it done in this way? The Court is not fond of giving effect to shadows. It would be merely a shadow to give effect to the contention that the property should have been first sold, and the widow's claim settled from the proceeds of the sale,—that agreement might be made before the sale as to the amount of her claim, but that only by a sale of the property, and out of the proceeds of that sale could the claim be settled.' I think the trustees here made a provident settlement. It is argued there should have been a settlement by way of assignment of dower. I do not think this is an assignment of dower at all; it is a settlement of a claim for dower. It is a reasonable and provident settlement. Is it reasonable, and is it one in the power of the Court to allow the trustees administering the estate to make, as has been done here? Why should it not be done? I see no reason why it should not be done. Want of jurisdiction is argued. I think jurisdiction exists; I should be sorry to think the

contrary. I think the claim fails, and the case must be dismissed with costs.

Judgment.

Ross,  
J.

As to the petition,\* I think if the executors have not power without the aid of the Court, and if the Court has such power, that this settlement ought to be approved of and confirmed. I am not sure as to the power of the Court to enforce, but as far as the Court has power I direct that the decree shall be drawn up approving and confirming the settlement. As to the costs of the petition, I will let the matter stand until I see the Chief Justice, and see what disposition he desires to make of them. As far as I can see myself, the petition was not necessary."

The plaintiff appealed to the Court of Appeal, and the appeal was argued on February 1st, 1897, before the second division, consisting of BOYD, C., and FERGUSON, and MEREDITH, JJ.

*G. G. S. Lindsey*, for the plaintiff.

*T. W. Howard*, for the Toronto General Trusts Company, referred to *Re The Canadian Pacific R. W. Co. v. The National Club*, 24 O. R. 205; *Martin v. Magee*, 18 A. R. 354; The Dower Procedure Act, R. S. O. ch. 56, sec. 4; The Devolution of Estates Act, R. S. O. ch. 108, secs. 4, 9.

*W. A. Skeans*, for the widow.

June 24th, 1897. FERGUSON, J.:—

The dower or right of dower which has been the subject of so much discussion here, is an estate in the land and cannot and should not be treated or dealt with as an

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\* The petition here referred to was by the Toronto General Trusts Company, in the matter of the estate in question, setting up the pendency of this action, and the facts in regard to the estate and the proposed compromise with the widow, and prayed that, under R. S. O. ch. 110, sec. 37, they might be advised by the Court whether they had power to carry out the proposed compromise, and if so, whether it was in the interest of the estate that they should do so. The petition came up before MEREDITH, C.J., who enlarged it, and directed the plaintiff in this action to plead at once and go down to trial early in September.—R&P.

**Judgment.****FERGUSON,  
J.**

encumbrance on the land. The widow has not made any election under the provisions of sub-sec. 2 of sec. 4 of ch. 108, R. S. O. She simply claims and insists upon having her dower though she is willing to take the conveyance of one of the lots in fee in satisfaction of dower out of the whole of the lands and in satisfaction of an alleged claim against the estate. This is the conveyance or proposed conveyance objected to by the plaintiff. The estate devolved upon the defendants for the purposes of administration. They are not owners of the lands. They are administrators with the will of the testator annexed.

This right of dower does not devolve upon the defendants at all. It was no part of the estate to be administered by them. It cannot, as before stated, be considered an encumbrance or in the nature of an encumbrance on the lands belonging to the estate that came into their hands to be administered. However convenient or advantageous it might be to obtain or get in this right of dower and then administer and distribute amongst those entitled the whole, that is, the lands freed from the dower, these defendants had no power to do this, they could not properly without the consent of all who are interested pay out moneys of the estate to purchase this right of dower, any more than they could properly purchase with such moneys a separate parcel of land. Strictly their duty was to administer the estate that did devolve upon them.

It is also clear, as I think, that the defendants have no power or authority to convey away one of the parcels of land as the price or purchase money for this dower or right of dower.

I am also of the opinion that the defendants have not the power to compromise the other claim as creditor of the widow as was proposed and intended, they being administrators and not executors: R. S. O. ch. 110, sec. 31.

I am of the opinion that the judgment appealed from should not stand. The plaintiff should on the merits succeed in both his contentions if only the actual legal merits are considered.

I am, however, of the opinion that the action should not have been brought. I cannot think it the proper course for a party who is dissatisfied with a matter in the course of an administration of an estate to bring an action and claim an injunction while there is a summary method of obtaining an order for administration by the Court in all proper cases. I also think that the action was unwisely defended for, as before stated, the actual merits only being considered, the plaintiff should succeed on both branches of the case.

Judgment.  
FERGUSON,  
J.

The proper course is, I think, to reverse the judgment appealed from, allowing no costs of the appeal or of the proceedings in the trial Court to either party, this, however, not to interfere with any right these defendants may have to recoup themselves for costs out of the estate in their hands.

If either party desires it there may be an order for administration by the Court.

If neither party elects to have administration by the Court within one month, the judgment will be allowing the appeal and dismissing the action without costs, the party electing to make the necessary amendments.

BORD, C. :—

I concur.

MEREDITH, J. :—

I am not prepared to assent to the contention that the defendants had power to give the doweress a part of the lands in question in fee simple in lieu of dower; nor am I prepared to say that they could, without the consent of the devisee, have given her a sum in gross in lieu of dower.

Her right was to have one-third of the lands and premises—having always due regard to the value and character of the buildings and erections—assigned to her for life :

Judgment. *McIntyre v. Crocker*, 23 O. R. 369. That was her right in her husband's lands; a right over which neither he nor his legal representatives, the defendants, had any power. It was not the lands absolutely that devolved upon the latter, but only the lands less that one-third for life.

MEREDITH,  
J.

It is only under peculiar circumstances, such as there being a mill or mills or factory upon the land, that, according to strict right, the widow can have, or be compelled to take, even a yearly sum for life in lieu of dower.

According to the old books an assignment of dower made by a disseisor, abator or intruder, or one of two joint tenants (such as the husband's grantees or devisees), in good faith, is good and shall not be avoided, because that is what she was entitled to and could have enforced; but an assignment of rent in lieu of dower would not bind, because that she was not entitled to and could not enforce. And none can assign dower but those who have a freehold or against whom a writ of dower lies.

The 4th section of the Dower Procedure Act, R. S. O. ch. 56, provides:

"4. The doweress and the tenant of the freehold may, by any instrument under their hands and seals executed in the presence of two witnesses, agree upon the assignment of dower, or upon a yearly sum, or a gross sum to be paid in lieu and satisfaction of dower, and a duplicate of the instrument proved by the oath of one of the subscribing witnesses, shall be registered in the proper registry office, and shall entitle the dowress to hold the land so assigned to her against the assignor and all parties claiming through or under him, as tenant for her life, or to distrain for, or to sue for, and recover in any Court having jurisdiction to the amount, the annual or other sum agreed to be paid to her by the tenant of the freehold; and the instrument so registered shall be a lien upon the land for such yearly or other sum, and shall be a bar to any action or proceeding by the dowress for dower in the lands mentioned therein."

But can the legal representatives be said to be "the

tenant of the freehold" to the exclusion of devisees or heirs-at-law. The Legislature has not seen fit to say so in any of the Devolution of Estates Acts; and has left the wording of this section just as it was before the passing of any of those Acts, and when it could not have applied to a legal personal representative. So that even these lesser powers do not seem to be conferred on the defendant.

Judgment.  
MEREDITH,  
J.

But it is not needful to determine this question. If the administrators have not the power their conveyance has no effect—there is no need to seek aid from the Courts: the case is not one of misuse of a trust or power; and so the action was rightly dismissed, but I am inclined to think upon wrong grounds.

I agree to a disposition of the case in accordance with the judgment of Mr. Justice Ferguson.

A. H. F. L

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## BARBER V. MCCUAIG.

*Mortgage—Mortgagor and Mortgagee—Covenant of Indemnity by Purchaser of Equity—Assignment of same to Mortgagee—Subsequent Dealings of Mortgagee with such Purchaser—Release—Damages.*

A mortgagor of land sold the equity and took from the purchaser a covenant to pay off the mortgage which he assigned to the mortgagee, who afterwards, without his knowledge, took by assignment from the purchaser the benefit of similar covenants from sub-purchasers, agreeing to exhaust her remedies against the latter before suing the purchaser :—

*Held*, that the mortgagee had not thereby lost her right of action on the mortgagor's covenant in the mortgage, and if the latter's rights against the purchaser of the equity from him had been impaired by the plaintiff's conduct, that would be matter for damages after enquiry.

**Statement.** THIS was an action on a covenant in a mortgage of land, dated March 13th, 1889, from Clarence James McCuaig, the defendant, to Eliza Barber, the plaintiff. The principal fell due on March 13th, 1893.

The defence set up that by deed of March 20th, 1889, the defendant conveyed the mortgaged lands to E. A. DuVernet, who covenanted with the defendant to assume and pay off the mortgage on maturity, and indemnify the defendant against it; that in 1889 and 1890, DuVernet granted the lands in separate parcels to three separate grantees, who respectively covenanted with him to pay off their proportions of the mortgage debt according to the portions of the land conveyed to them; that on October 31st, 1893, the defendant assigned to the plaintiff the above covenant of DuVernet to assume and pay off the mortgage, upon the understanding that the plaintiff would pursue her remedies against DuVernet, and not in the meantime make any demand on the defendant under the mortgage; that on January 25th, 1894, without the knowledge or consent of the defendant, the plaintiff entered into an agreement with DuVernet, whereby the latter assigned to the plaintiff the covenants of the several purchasers from him to pay off their respective proportions of the mortgage, and the plaintiff covenanted and agreed with DuVernet not to make any claim against DuVernet till she had exhausted her

remedies against the said purchasers from him ; that thus the plaintiff had materially varied the terms of the contract between himself and the defendant by extending to DuVernet the time for payment of the mortgage money, and had thus released and discharged the defendant from all liability under the mortgage ; that the plaintiff, by the agreement of January 25th, 1894, had materially impaired, if not altogether destroyed, the value of DuVernet's covenant, assigned to her by the defendant as additional security for payment of the mortgage money, and had in effect released DuVernet from his liability to pay off and discharge the said mortgage, and was, therefore, not now in a position to assign or secure to the defendant the full value and benefit of the said covenant, and it would, therefore, be unfair and inequitable to ask the defendant to pay the plaintiff the amount due under the mortgage. Statement.

The action was tried at the Toronto non-jury Sittings on September 22nd, 1896, before ROSE, J.

*W. R. Riddell and Kilmer*, for the plaintiff.

*A. B. Aylesworth, Q. C., and Rykert*, for the defendant.

September 24th, 1896. ROSE, J. :—

This case was heard and argued on the day after *Smith v. Pears*,\* in which I have just delivered judgment. That case is somewhat similar to the one in question, being an endeavour by a mortgagee to enforce a covenant against a mortgagor to pay the mortgage money after the mortgagor had parted with his interest in the land.

A very interesting question arises. The mortgage was made by the defendant C. J. McCuaig to Mrs. Eliza Barber to secure something over \$3,000. McCuaig shortly afterwards made a conveyance of the land, or of the equity of redemption to Mr. DuVernet, the conveyance being subject to the mortgage, DuVernet giving a covenant to McCuaig to pay the mortgage. The words of the covenant are:



Judgment.

Rose,  
J.

" Assume the said mortgage against the said lands, and save the said party of the first part harmless from all loss, costs and damages in connection therewith." DuVernet sold or contracted to sell the land in four several parcels to the persons whose names appear in the conveyance, taking from them, or from some of them, probably from all of them, a contract of indemnity against the mortgage in question. McCuaig assigned to the plaintiff, Mrs. Barber, DuVernet's covenant, probably on a representation that by doing so the plaintiff would look to DuVernet, at any rate in the first instance, and not trouble him, the plaintiff, although there was no such term in the written agreement or assignment of the mortgage to the plaintiff. Of course, then, the plaintiff's right of action against DuVernet on that covenant, in case of default, would be established upon the production of the documents I have referred to. After the assignment by McCuaig to the plaintiff of DuVernet's covenant, the plaintiff entered into a contract or agreement under seal with DuVernet, in which in consideration of DuVernet giving to the plaintiff his right against the respective purchasers of the several parcels, the plaintiff undertook and agreed not to look to DuVernet until she had exhausted her rights against the land and against these several purchasers under the assignment which DuVernet gave to her. The plaintiff at this time held, as I have said, the assignment of DuVernet's covenant, and therefore her position at that time was that, apart from any agreement, which was not proven before me, she might have sued McCuaig on his covenant in the mortgage, and if this assignment by McCuaig to the plaintiff was collateral, she might have proceeded upon the assignment, upon the covenant against DuVernet, but by her agreement she placed it out of her power to sue DuVernet or make any claim upon him until the other remedies had been exhausted. What effect had that upon the covenant of McCuaig to pay this mortgage money, he being the mortgagor? The position of mortgagor and mortgagee with respect to such

covenants, and the purchaser of the equity of redemption, has been considered in several cases which were cited at bar, and to which I do not refer by name, and it is perfectly clear as between the mortgagor and the purchaser, the purchaser becomes the principal debtor, and the mortgagor the surety. How far that relation between these parties affects the mortgagee is stated in at least two, if not three, of the decisions recently given, and it may be assumed that until, at any rate, the mortgagee does some act which creates a privity between himself and the purchaser of the equity, the mortgagor and the purchaser of the equity do not sustain towards him the relation of principal and surety, because he has no right or claim upon the purchaser of the equity in respect of the mortgage debt. It is not necessary for me to determine in this case the point that was taken and argued, whether by taking an assignment of DuVernet's covenant from the mortgagor and dealing with DuVernet as has been done here, the mortgagee placed herself in the position that she had to deal thereafter with McCuaig and DuVernet as surety and principal with respect to the debt. I think another principle comes into play here, and must be given effect to. I have no doubt whatever that the view I expressed upon the argument is one that must obtain, with me at any rate, that when McCuaig assigned this covenant of DuVernet to the plaintiff he was giving her a collateral security to the mortgage. I do not think it needs elaboration to convince one that that is so. At any rate I feel, as far as my own dealing with the case is concerned, it to be without doubt. Then the rights of McCuaig, when called upon to pay this mortgage by the mortgagee are well defined. He would be entitled upon payment of this mortgage to have a reassignment of this covenant in addition to a conveyance of the land, and if the mortgagee has by her dealing with Mr. DuVernet put it out of her power to reconvey to McCuaig either the land or the collateral security, the covenant, in the same condition, and with rights similar to

Judgment.

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ROSE,  
J.

Judgment.

ROSE,  
J.

what they were at the time of the transaction which forms the subject matter of this suit, it is perfectly clear that McCuaig is discharged from all liability in respect of the covenant.

It must be kept in mind, what no practitioner of experience will forget, that a mortgage creating a security upon land is quite a distinct and different thing from a covenant debt. As a matter of convenience they are placed in the same instrument, but they might very well be in separate instruments, and so I am not concerned with the question which was considered in *Trust & Loan Company v. McKenzie*, 23 A. R. 167, as to whether or not the mortgagee is in a position to hand back the land which was taken as security, but the simple question is, the plaintiff having a covenant debt, by which McCuaig was bound to pay a certain sum of money, having obtained from McCuaig collateral security for the payment of that debt, namely, a covenant by DuVernet with McCuaig to pay the debt which gave the plaintiff a new right of action, and having put it out of her power to sue DuVernet for a time named in the agreement between her and DuVernet, and so having bound McCuaig in case of reassignment of the covenant to McCuaig, is she in a position now, if McCuaig should come forward and pay off the mortgage, to give back to him the covenant or this collateral security which was assigned to her as has been stated? There is one case that was not cited which I happened to note in DeColyar on Guarantees, namely, *Campbell v. Rothwell*, most conveniently reported, I think, in 38 L. T. N. S. 33. Unless I misread the case, the text of DeColyar is not quite right. The text reads thus: "And therefore where the creditor has so dealt afterwards with such security that on payment by the surety it cannot be given up to him in the same condition as it was when the creditor first acquired it, the surety is discharged to the extent of such security. The words "to the extent of such security" I do not find in the decision. I think the text should read without that

limitation. The principle which I have acted upon here is found in *Allison v. McDonald*, 23 S. C. R., at pp. 638-9. In that case the learned Chancellor, the Judge of first instance, held that the mortgage and promissory notes having been given for the same debt, the appellant could not recover upon the note after having released the mortgage, inasmuch as, apart from any relation of principal and surety existing between Adam Allison and the respondent, the latter on payment of the note would have been entitled to a transfer of the mortgage, which the defendant had by discharging the surety, put it out of his power to give him. The learned Chief Justice of the Supreme Court entirely agreed with that view, which seems to have been lost sight of in the intermediate Courts to some extent, and gave effect to the opinion which the learned Chancellor there expressed. That opinion is not only binding upon me, but as far as I may be permitted to say so, I cordially assent to and act upon it, as a statement of the law as I understand it to be upon the authorities.

Judgment.

ROSE,  
J.

The result is that in this case the plaintiff fails, and the action is dismissed with costs.

The plaintiff appealed to the Court of Appeal, and the appeal was argued before the second division, consisting of BOYD, C., and FERGUSON and MEREDITH, JJ., on February 2nd, 1897.

*Irving*, for the plaintiff. The defendant's right is to be indemnified for any loss he has sustained from our improper dealing with the security. He has a right to an account. If we have lost our right against the defendant on his covenant, we have lost our right against DuVernet, whose liability is only to indemnify: *Allison v. McDonald*, 20 A. R. 695, 23 S. C. R. 635, 642; *Smith v. Pears*, 24 A. R. 82; *Williams v. Price*, 1 S. & S. 581; *The Land Security Co. v. Wilson*, 22 A. R. 151, 160, 26 S. C. R. 149; *Brandt on Suretyship and Guaranty*, 2nd ed., vol. 2, sec. 440; *Colebrooke on Collateral Securities*, secs. 63, 87, 114;

**Argument.** *Ryan v. McConnell*, 18 O. R. 409; *Molson Bank v. Heilig*, 26 O. R. 276; *Synod v. DeBlaquiere*, 27 Gr. 549.

*Aylesworth*, Q.C., for the defendant. The effect of the transaction has been to make DuVernet principal and McCuaig surety as between themselves: *Rouse v. Bradford Banking Co.*, [1894] A. C. 586; *Allison v. McDonald*, 23 S. C. R. at p. 642. Whatever difficulty there might have been if the plaintiff had not consented to McCuaig's position as surety to DuVernet, she has accepted the position. The plaintiff's action prevents McCuaig getting what he would be entitled to on paying off the debt for which he is surety. Thus she has discharged McCuaig. If McCuaig now attacked DuVernet he would have the same answer against him, as he would have against the plaintiff. All that is necessary for us here is to establish that there was the relation of principal and surety between the parties. The plaintiff deliberately accepted DuVernet as primary debtor: *Mathers v. Helliwell*, 10 Gr. 172; *Campbell v. Robinson*, 27 Gr. 634; *Blackley v. Kenney*, 29 C. L. J. 108; *Aldous v. Hicks*, 21 O. R. 95. The suretyship and the giving of time by the creditor makes out the case for the defence.

*Irving*, in reply. Before there can be the relationship of principal and surety, the two parties must be full debtors to the plaintiff. They were not so here. One was liable, not on a covenant to pay, but on a covenant to indemnify only: *Land Security Co. v. Wilson*, 22 A. R. 151, at p. 160; *Trust Corporation of Ontario v. Hood*, 23 A. R. 589; *Trust & Loan Co. v. McKenzie*, 23 A. R. 167. What the defendant argues for really is a novation. But we cannot be said to have agreed to any novation: *Trust Corporation v. Hood*, 23 A. R., at p. 591. We dealt with DuVernet as McCuaig's assignee, not as mortgagee. The relationship of principal and surety does not arise whenever a creditor takes a collateral security: *The Girard Fire and Marine Ins. Co. v. Marr*, 46 Penn. 504. What the plaintiff did, she did in a *bond fide* endeavour to get payment of the mortgage, in the interest of the mortgagor.

June 14th, 1897. BOYD, C. :—

Judgment.

BOYD, C.

The only instrument needful to be considered in the present case is the assignment from DuVernet to the plaintiff, dated January 25th, 1894. This latter, without knowledge of the defendant, and the stipulations therein between DuVernet and the plaintiff as to all remedies being exhausted against the lands mortgaged and certain covenantors of DuVernet therein named, have, it is said, materially changed the position of the defendant as surety for DuVernet and so worked his discharge. The suretyship is said to have arisen from the fact that defendant being mortgagor and under covenant to pay the mortgage money to the plaintiff, transferred his equity to DuVernet, who thereon assumed payment of the mortgage in exoneration of the mortgagor. This engagement to exonerate was transferred by the defendant to plaintiff. The covenant to pay the mortgage made by the defendant is one distinct liability, not to be confounded with the right of indemnity which arises by virtue of DuVernet undertaking to pay the mortgage as between him and the defendant. This undertaking or obligation (for it falls short of a covenant), is one to indemnify only, and creates liability for damages only between DuVernet and McCuaig.

The right of action under this is transferred by McCuaig to the plaintiff which does not carry the matter any further. It does not make DuVernet the principal debtor, nor does the defendant cease to be originally liable on his covenant to the plaintiff.

Then there is the acquisition of certain rights which DuVernet has against his grantees, with a stipulation to exhaust them and the remedy against the land before the right of action transferred from McCuaig would by the plaintiff be enforced against DuVernet.

Why should the plaintiff be precluded from suing the defendant on the original and distinct cause of action under the covenant to pay the mortgage money? If there has arisen or will arise any prejudice to the defendant

Judgment.

BORN, C.

because the plaintiff, as McCuaig's assignee of the right of action against DuVernet, has made such a bargain with DuVernet as will tie the hands of the defendant in getting indemnity from DuVernet immediately, that is a matter to be estimated in damages after an enquiry, and upon proper evidence of loss, but it offers no obstacle in my opinion to the right of action on the covenant to pay, which has not been disturbed by any of the subsequent dealings as to the equity of redemption or the right of indemnity as between defendant and DuVernet.

Taking it, as was done at the trial, that the assignment of this liability by DuVernet is to be regarded as a collateral or additional security, the law of the land is that the total loss of such a security does not discharge the surety absolutely but only *pro tanto*, i.e., the surety will be relieved only to the extent of the value of such security. See such cases as *Capel v. Butler*, 2 S. & S. 457, *Strange v. Fooks*, 4 Giff. 408, *Dowden & Co. v. Lewis & Copithorne*, 14 L. R. Ir. 307.

What the amount of loss is in this case, if any, is not before us. The judgment dismissing action does not seem to be sustainable, and there should be the usual judgment to pay, with an enquiry, if sought by defendant, as to any damages sustained by matters pleaded in defence. Costs to hearing and of appeal to the plaintiff.

I may note that I do not see why there should be any postponement of the right of action as between McCuaig and DuVernet, in case the plaintiff recovers in this action and levies the covenant money from McCuaig. He can at once begin an action against the three covenantors of DuVernet and DuVernet himself, on his agreement to indemnify as for a claim in respect of the mortgage money, though there may be a marshalling of executions as between the covenantors and DuVernet as the outcome of the agreement in the instrument of January 25th, 1894, of which on the hypothesis McCuaig would be the holder under the plaintiff. The remedy by sale could also be sought and obtained in the same action.

FERGUSON, J. :—

Judgment.

I concur.

FERGUSON, J.

MEREDITH, J. :—

The principle upon which the learned trial Judge proceeded is plain, and well understood, that is, that a pledgee cannot enforce, by suit, payment of the debt secured by the pledge, unless he is prepared to restore the pledge upon payment; but I am unable to perceive how that principle can be properly applied to this case, for here the security is the mortgaged lands, and the plaintiff is ready and willing to reconvey them unimpaired upon payment of the mortgage debt, which she seeks to recover in this action.

It is true that she cannot reassign to the mortgagor the obligation of his purchaser to indemnify him against the mortgage, in the same plight in which it was assigned by him to her as additional security for the mortgage debt; but the assignment was made for the very purpose of enabling the plaintiff to realize what she could out of this obligation, and the plaintiff has dealt with it in that way, getting for some delay in attempting to enforce it, assignments from this sub-purchaser of like rights which he had acquired from purchasers of the same lands from him.

The plaintiff having done what she had authority to do, if done negligently to the mortgagor's loss, is accountable to the mortgagor to the extent of the injury he has sustained, but she is not altogether precluded from enforcing her claim upon the mortgage.

There is no evidence whatever of the mortgagor having sustained any injury by the transaction complained of; it may have been the best thing that could have been done in the mortgagor's interests, which were the same as her own; but that may be the subject of inquiry upon taking the mortgage accounts in the Master's office.

Even if the case were one of principal and surety, and not merely of mortgagor and mortgagee, there would be



Judgment.

MEREDITH,  
J.

nothing in it to wholly preclude the plaintiff from enforcing payment of her claim, having regard to the power intended to be conferred, and conferred under the assignment in question.

I would allow the appeal with costs; there should be the usual judgment, with, if the defendant desire it, a reference of the question whether he has sustained any injury, for which he is entitled to compensation, by reason of the plaintiff's act complained of, and a direction that if so, the amount is to be ascertained and set off against the mortgage debt.

A. H. F. L.

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### BOULTBEE V. GZOWSKI.

*Broker—Sale of Shares—Undisclosed Principal—Marginal Transfer—Principal and Agent—Indemnity.*

A broker who buys bank shares for an undisclosed principal and does not accept the shares himself but, pursuant to a general power to transfer given by the vendor, transfers them to his principal, is not liable to indemnify the vendor against the statutory "double liability" which the principal fails to pay.

*In re Central Bank of Canada—Baines's Case*, 16 A. R. 237, referred to. Judgment of a Divisional Court, 28 O. R. 285, reversed.

Statement.

THIS was an appeal by the defendant from the judgment of a Divisional Court [ARMOUR, C.J., FALCONBRIDGE, and STREET, JJ.], reported 28 O. R. 285, and was argued before BURTON, C. J. O., BOYD, C., and OSLER, and MACLENNAN, JJ.A., on the 8th and 9th of June, 1897. The facts are stated in the report below, and the line of argument is there indicated.

*Aylesworth*, Q. C., and *W. Barwick*, for the appellant.

*H. J. Scott*, Q. C., and *R. Boulton*, for the respondent.

September 14th, 1897. BURTON, C. J. O. :—

Many of the cases referred to are cases governed by the rules and usages of the London Stock Exchange, and do

not afford us much assistance in deciding the present case. Judgment.

It was contended on the part of the plaintiff, that this was simply a case of an agent acting for an undisclosed principal, and that the liability in such a case was so well established that the responsibility of the defendant to indemnify his vendor followed as of course.

BURTON,  
C.J.O.

That liability as between vendor and purchaser is also clear, that the purchaser of shares besides paying for and accepting a transfer of them, is under an obligation to indemnify his vendor against all liability in respect of them, at least so long as he remains the owner of them. Whether that liability would extend to what is known as the double liability under the statute arising after he had ceased to be owner, is one of the questions which may have to be considered.

It was found by the learned Judge at the trial that Cochran, through whose assignment the plaintiff claims, and who may in fact be treated as the plaintiff, was a stock broker and a member of the Toronto Stock Exchange, and the owner of the stock in question, twenty shares in the Central Bank, and offered them for sale in the usual way at the Exchange; and that they were bought by the defendant, who was also a stock-broker and a member of the Exchange; nothing being said as to whether the purchase was being made for himself or a client.

The course of business in such a case is, that on the following business day the dealing brokers meet to conclude the transaction, the one paying the purchase money, and the other executing the transfer or placing it in the power of the other to transfer.

The course open to Cochran was this: he might have executed a transfer to Gzowski or to his nominee if satisfactory; and he might have declined to execute a transfer to the nominee if he was not reasonably satisfied with him as to his solvency or ability to contract. Until the shares were accepted, either by Gzowski or his nominee, the transaction was incomplete, and as between Cochran and the bank he still remained the shareholder.

**Judgment.**  
**BURTON,**  
**C.J.O.**

If, however, the transfer had then been executed to Henderson as the actual purchaser, or even as the nominee of Gzowski, the transaction would have been completed, and Henderson alone would have been liable to Cochran to indemnify him against future calls or liabilities.

What actually took place was this: he executed a transfer, leaving the name of the transferee blank, and giving power by a marginal entry to fill in the transferee's name.

As already intimated, Cochran was entitled not only to exact payment of the price, but he was entitled to have the shares accepted either by Gzowski or some one satisfactory to him, but he was at liberty if he chose to leave the selection of the transferee to Gzowski, and this he in effect did when he signed the marginal memorandum; it was a *carte blanche* to him to transfer to whom he chose; and this, under the circumstances, need not be matter of surprise, as the shares were fully paid up—it would have been otherwise if the shares had been only partly paid up and subject to future calls.

The possibility of being called upon for the double liability no doubt never suggested itself to any one.

Whenever then Gzowski placed the shares under the control of Henderson, which he did on the 29th of October, 1887, and Henderson accepted, which he did on the same day, Henderson became the legal holder of the shares, in addition to the fact that he was also the original purchaser, and the person alone liable to indemnify his vendor.

It is unnecessary to consider what might have been the liability of the defendant if the transfer to Henderson had never been completed.

The liability arose whilst Cochran was the legal holder of the shares, and the calls were made after the real purchaser Henderson had become the legal owner.

I think that under the circumstances of this case, Cochran is in the same position as he would have been had he, on the day the transaction was completed, exe-

executed a transfer direct to Henderson, and that he is as much bound by the transfer through his agent to Henderson as if he had executed it himself—he has thereby accepted him in exoneration of any possible claim against the broker.

Judgment.  
BURTON,  
C.J.O.

With great respect, therefore, I think that we should reverse the judgment of the Divisional Court and restore that of Mr. Justice Meredith, with the costs of this appeal and of the Court below.

BOYD, C. :—

The evidence does not warrant the conclusion that there was at any time a completed transaction of sale and purchase of these shares as between Cochran and Gzowski. The reasonable and proper inference from the manner of dealing was that the defendant, as broker, undertook to find a purchaser acceptable to the seller; failing to do which he might be liable personally. The defendant never intended to buy for himself, and the person he represented became the actual purchaser, accepted the shares, and did all that was necessary to make him legally transferee of the shares. The transaction thus completed placed all liability on Henderson, and left the defendant exempt.

He never incurred liability as purchaser—his possible liability, as such, never arose in fact, because the person for whom he acted accepted the shares and was accepted by the vendor as the purchaser. Till the time of actual transfer in the books the seller had the right to object to the sufficiency or responsibility of the buyer; but having acquiesced in the implementing of the contract on the part of Henderson as transferee, he has accepted him in exoneration of any possible claim on the broker—who acted merely as the intermediary. I am satisfied to rest the whole matter in appeal on this ground, which is in affirmance of the original judgment and in opposition to the appellate judgment in the Divisional Court: *Grissell v.*

Judgment. *Bristow*, L. R. 4 C. P. 36; *Nickalls v. Merry*, L. R. 7  
Board, C. H. L. at p. 544.

OSLER, J. A. :—

I am of opinion that the dealing of Cochran, Gzowski, and Henderson, in respect of these shares as evidenced by the assignment, marginal notes thereon, and acceptance by Henderson, and the transfer in the bank books, is to be regarded as an assignment and transfer of the shares by Cochran to Henderson direct. Undoubtedly the defendant did in the first instance, as between himself and Cochran, become the purchaser, though not the legal transferee of the shares, and had nothing more been done he would probably have been bound to save his vendor, the shareholder, blameless and indemnified from the double liability thereon. He re-sold them, however, to Henderson. Had Cochran at his request executed a formal transfer of them to the latter, Henderson executing as he has done a formal acceptance, and procuring himself to be registered in the books of the bank as the transferee and holder, I think it could not have been contended for a moment that Cochran would have had any claim to be indemnified by the defendant. That is the effect, as I understand them, of the decisions in *Walker v. Bartlett*, 18 C. B. 845; *Shaw v. Fisher*, 5 D. M. & G. 596; and *Moxted v. Paine*, L. R. 6 Exch. 122.

His sole recourse would have been against Henderson; and had the latter been solvent he would no doubt have pursued him for the relief now sought from Gzowski. Then, do the facts present any practical difference from the case supposed? I think not. The marginal note or marginal transfer, as it is called, is no more than a power of attorney from Cochran to the defendant to put forward the person to whom he might sell the shares as the final purchaser instead of himself. That is what was done. Gzowski gives Henderson's name as purchaser, and he is accepted as the transferee by Cochran's authority instead

of Gzowski. He, instead of Gzowski, became the shareholder, subject to the double liability, and liable to indemnify his vendor Cochran.

A plain novation has, in my opinion, taken place, which precludes Cochran from asserting any demand against Gzowski in respect of their agreement.

This was the view which, in *In re Central Bank of Canada—Baines's Case*, 16 A. R. 237, 249, I expressed of such a transaction as the present, in another aspect of it. I would, therefore, with all deference, reverse the judgment of the Divisional Court and restore that of the learned trial Judge.

MACLENNAN, J. A. :—

I am of opinion, with great respect, that this appeal should be allowed, and that the original judgment should be restored.

In *In re Central Bank of Canada—Baines's Case*, 16 A. R. 237, we had to consider the effect of such transfers as were made in the present case; and I think it is clear that until acceptance by Henderson the shares in question remained in Cochran, and that Gzowski never became or was a legal shareholder.

The judgment, however, proceeds on the ground that Cochran had no notice that Gzowski was acting for another, and not for himself, in buying the shares. That would be very material if the transaction had still remained *in fieri*, and had not been carried out. The fact was that Gzowski was not acting for himself, but for Henderson, and paid for the shares with money received from Henderson for the purpose; and then the transaction was carried out with Henderson, and not with Gzowski. If a person who has contracted with the agent of an undisclosed principal chooses to carry out the contract with the principal, the agent can no longer be liable. And if afterwards a cause of action arises, not out of the contract, but out of the completed transaction, it must be the principal alone

Judgment.

ORDER,  
J. A.

**Judgment.** and not the agent who is responsible. Here the contract  
**MACLENNAN, J.A.** was to transfer the shares to any one Gzowski should  
name. He named Henderson, who accepted the shares  
and became the owner of them, and the transaction then  
became complete. It was after that completion that Cochran's cause of action now sued upon arose, by reason of Henderson's failure to pay the calls occasioned by the bank's failure. The case of *Walker v. Dickson*, 20 A. R. 96, is relied upon for the plaintiff, but I do not think it helps him. In that case it was the principal who was held liable. The present judgment is as if in *Walker v. Dickson*, after conveyance to the real purchaser's nominee, an agent who had made the contract of purchase without disclosing his principal had been held liable to pay off the prior mortgage. There can be no question that because the contract was carried out with Henderson, whereby he became the shareholder, he became liable to indemnify Cochran, a circumstance which distinguishes this case from *Walker v. Bartlett*, 18 C. B. 845, and it is noticeable, that the recourse which is saved by the statute (R. S. C. ch. 120, sec. 77) is "against those to whom they (the shares) were transferred."

I think that the appeal should be allowed.

*Appeal allowed.*

R. S. C.

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## IN RE RUBY.

## TRUSTS CORPORATION OF ONTARIO V. RUBY.

*Partnership—Joint and Separate Creditors—Administration.*

In the administration by the Court of the insolvent estate of a deceased partner the surviving partner is entitled to rank for a balance due to him in respect of partnership transactions and partnership debts paid by him, when, apart from his claim, there would be no surplus available for partnership creditors.

Judgment of a Divisional Court reversed, OSLER, J.A., dissenting.

THIS was an appeal by Henry Barber from the judgment of a Divisional Court. Statement.

Barber, as assignee for the benefit of creditors of Henry Hilker, claimed the right to rank in the administration of the estate of William Henry Ruby, a deceased partner of Hilker, for a debt due by Ruby to Hilker.

The following admissions were made by the parties interested :—

William Henry Ruby and Henry Hilker carried on business as general merchants at Port Elgin in partnership.

Ruby died on the 8th of August, 1892, intestate, and the plaintiffs are administrators of his estate, which is insolvent and is being administered by the Master at Walkerton.

After the death of Ruby, Hilker, as surviving partner, made an assignment of the partnership assets to Barber for the benefit of creditors, and he also made an assignment of his separate assets to Barber for the benefit of creditors.

At the time of Ruby's death and at the time of these assignments the firm of Ruby & Hilker was insolvent and Hilker, the surviving partner, was solvent.

At the time of Ruby's death and at the time of these assignments and at the present time, there is, on an adjustment of the partnership accounts in respect of partnership transactions and partnership debts paid by Hilker,



**Statement.** a balance due by Ruby and his estate to Hilker, the exact amount of which is left open for adjustment, and Barber, as assignee of Hilker, claims against the estate of Ruby for this balance.

Apart from this claim, the claims against the estate of Ruby are admitted to be as follows :—

[Then followed a list of creditors, the total claims amounting to about \$4,000.]

Claims (1), (2) and (3), are for trust moneys handed to Ruby for investment but deposited by him to the credit of Ruby & Hilker and used in their business ; claim (6) is for moneys received by Ruby as treasurer of the School Board and due by him to the Board at the time of his death ; and the other claims are for ordinary debts due by him. There is sufficient in the estate to pay claims (1), (2), (3), and (6) in full.

The assets of the estate of Ruby consist almost entirely of insurance moneys payable under life insurance policies to his administrators and received by them.

Upon these admissions the Master ruled that Barber was entitled to rank, and evidence was then given as to the amount of the claim. It was shewn that at the time of Ruby's death he was indebted to Hilker on capital account in the sum of about \$3,000, and that since Ruby's death Hilker had paid to partnership creditors, out of his separate estate, about \$12,000 ; that there was still payable to partnership creditors about \$6,000, and that Barber, as Hilker's assignee, had in his hands assets sufficient to meet this indebtedness. Hilker's claim was then by consent fixed at \$8,000. Upon this basis there were sufficient assets in Ruby's estate to pay a dividend of about 30 cents on the dollar, while excluding Barber's claim there were assets sufficient to pay Ruby's separate creditors a dividend of about 90 cents on the dollar.

The administrators and the creditors other than Barber appealed from the allowance of his claim, and the appeal was argued before a Divisional Court [ARMOUR, C.J.,

FALCONBRIDGE, and STREET, JJ.], on the 17th of April, 1896, and on the 1st of September, 1896, the appeal was allowed, the following judgments being delivered :— Statement.

ARMOUR, C.J. :—

[The learned Chief Justice stated the facts and continued :]

The condition upon which one partner who is a creditor of another may, on the death of the latter, prove against his separate estate in competition with his other separate creditors is said by Mr. Lindley, in his work on partnership, to be either that there never were any joint debts, or that all those which once existed have ceased to exist, either because they have been paid, barred, or satisfied, or converted into separate debts.

This condition not having been shewn to exist in this case, the claim of Barber must be disallowed and the appeal allowed with costs.

STREET, J. :—

I think it clear that this appeal must be allowed, following the principles which have been laid down with regard to the administration of partnership estates. It is admitted by counsel that only a part of the partnership debts of the firm of Ruby & Hilker have been paid, and that the partnership is insolvent. It is true it is also admitted that Hilker's estate is solvent, but he has not paid all the debts of the partnership. Until he has done so he cannot prove upon the separate estate of his co-partner, because if the partnership creditors should not be paid in full out of the partnership assets they would have a right to rank upon any surplus of Ruby's separate estate after his separate creditors have been paid in full; and Hilker's claim, if allowed against Ruby's separate estate, would diminish the possible surplus of that estate upon which the creditors of Ruby & Hilker, as a firm, might ultimately

**Judgment.** rank : Lindley on Partnership, 6th ed., p. 755, and cases there cited ; *Ex parte Watson*, 4 Madd. 477 ; Yate Lee's **STREET, J.** Law of Bankruptcy, 3rd ed., pp. 244, 246.

The unpaid creditors of the firm are creditors of each partner, ranking upon the separate estate of each partner after the separate creditors of that partner are paid in full, in case the partnership estate is insufficient. Until they are paid in full it is uncertain whether they may not require to rank upon the separate estate in order to obtain payment in full ; therefore, until they are paid in full, one partner, who is a creditor of the other by reason of partnership transactions, can never rank upon the separate estate of that other lest he should, in the result of the whole winding up, come into competition, in such ranking, with his own creditors.

Upon this ground, I am of opinion that the appeal should be allowed with costs.

FALCONBRIDGE, J., concurred.

Barber appealed and the appeal was argued before BURTON, C. J. O., BOYD, C., and OSLER, and MACLENNAN, J.J.A., on the 7th of June, 1897.

*R. S. Cassels*, for the appellant. The Ruby estate being admittedly insolvent, apart from the claim made on behalf of the surviving partner, it is clear that there cannot, under any circumstances, be a surplus for the creditors of the firm of Ruby & Hilker, and those creditors are not interested in Ruby's estate. There can be, therefore, no conflict between Barber as assignee of Hilker, and the creditors of Ruby & Hilker, and the rule of law invoked by the learned Judges of the Court below does not apply : Lindley on Partnership, 6th ed., pp. 755, 759 ; Robson's Law of Bankruptcy, 7th ed., p. 736 ; *Ex parte Topping*, 4 DeG. J. & S. 551 ; *Ex parte Sheen*, 6 Ch. D. 235 ; *Ex parte Andrews*, 25 Ch. D. 505 ; *In re Head*, [1894] 1 Q. B. 638. Moreover, this statutory artificial rule of administration

in bankruptcy should not be given effect to here in the administration of estates: *Lacey v. Hill*, L. R. 8 Ch. 441, at p. 444; *Eastman v. Bank of Montreal*, 10 O. R. 79; *Young v. Spiers*, 16 O. R. 672. Although the partnership creditors have not been paid in full there have been transferred to Barber, for their benefit, sufficient assets to meet their claims and that is another reason for taking the case out of the rule. In the administration of an insolvent estate a claim in respect of trust funds has no priority: R. S. O. ch. 110, sec. 32; *Culhane v. Stuart*, 6 O. R. 97.

*Aylesworth*, Q. C., for the respondents the administrators. The claim attempted to be made here is in respect of partnership transactions and partnership debts. The cases do not go far enough to allow a claim under those circumstances. It is only if the claim arises in respect of transactions unconnected with the partnership that one partner can claim against his co-partner. And the right to rank arises only when all partnership debts have been paid: *Ex parte Moore*, 2 Gl. & J. 166; *Ex parte Carter*, 2 Gl. & J. 233; *Nanson v. Gordon*, 1 App. Cas. 155; *Ex parte Collinge*, 4 DeG. J. & S. 533. It is not sufficient to shew the insolvency of the separate estate. It would be absurd to give the right to claim against an insolvent estate because it is only in that case that the separate creditors would be affected at all. The rule applies in administration proceedings: *Baker v. Dawbarn*, 19 Gr. 113.

*J. B. Clarke*, Q. C., for the separate creditors claiming in respect of trust funds, argued on the same lines and contended in addition that these creditors were entitled, in any event, to priority in the distribution of the assets.

*R. S. Cassels*, in reply.

September 14th, 1897. BURTON, C.J.O.:—

In the last edition (6th) of Lord Justice Lindley's book it is said (p. 755): "It is now settled, in opposition to some older cases, that a solvent partner is not entitled to rank as a creditor against the estate of his bankrupt co-partner

**Judgment.**

**BURTON,  
C.J.O.**

upon indemnifying that estate against the claims of the joint creditors; he must shew that those claims are discharged or otherwise barred," and *Ex parte Moore*, 2 Gl. & J. 166, is cited for that position. Upon referring to that case, which was decided by Lord Eldon, it will be found that the whole difficulty arose from the wording of the Bankrupt Act. The learned Judge's inclination and wish was to decide the other way. "I have tried," he said, "to think otherwise but cannot: I cannot get rid of the difficulty which the Act of Parliament has interposed." The Act provided "that any person who shall be surety for or liable for any debt of the bankrupt, if he shall have paid the debt or any part thereof in discharge of the whole debt, etc., may prove." The rule applies only to cases arising under the Bankrupt Act then in force and would not seem to apply to a case like the present.

But there is a point in the case which appears to have been overlooked in the Court below, viz., that the deceased partner was insolvent and that his estate was quite insufficient to pay his separate creditors.

The principle upon which the rule has been established that a partner cannot prove against his co-partner in competition with the separate creditors is for the benefit of the joint creditors who may be injured by the partner stopping *in transitu* the surplus of the separate estate, which would be carried over to the joint estate; but that rule can have no application where there is no possibility of a surplus for the benefit of the joint estate.

The difficulty I was at first troubled with arose from a misapprehension of the extent of the admission. I was under the impression that without a thorough investigation of the partnership accounts Hilker or his assignee was seeking to prove for the amount which he had paid of the partnership debts in excess of those paid by his co-partner and he was seeking to prove for the full amount of that excess, although he was equally liable with his partner to the creditors, and that it could only be for a portion of the amount, assumed as I thought upon the argument to be

one-half, but it is clear that that would not necessarily be the proportion, and therefore until the account had been fully taken and the actual debt due by Ruby to Hilker ascertained upon an adjustment of the whole accounts, the assignee was not in a position to prove.

I think that is the true position of a partner against his co-partner upon a winding up.

I quote from Lord Cairns in a case before the Lords Justices: *In re Braginton*, L. R. 2 Ch. 550: "I do not desire to express any opinion upon many of the points which have been argued in this case, but upon this point I have no doubt whatever, that one individual partner cannot prove against the estate of his partner for any one debt in respect of the partnership. How it would be if the accounts of the partnership were taken in a proper way I express no opinion."

Being at first under the impression that the applicant was tendering a proof in respect of the sum paid by Hilker of the partnership debts in excess of his co-partner, and that the admission extended only to that, I was impressed with the difficulty suggested by Lord Cairns in the above extract, but on examining the admission more critically and reading it in connection with the findings of the Master and the state of the accounts as shewn in his report, and the admission of the plaintiffs' manager, I think the admission recognizes a balance due by the insolvent partner far in excess of the sum for which the proof is tendered upon a general adjustment of the partnership accounts—an amount liable to be increased, but not diminished, whenever the balance of the partnership debts are actually paid. By placing his proof at \$8,000 the separate creditors are benefited and the objection as to all the debts not having been paid falls to the ground.

I am of opinion, therefore, with great respect, that the judgment below ought to be reversed and the proof admitted, and I see no reason why the costs of the appeal should not follow.

Judgment.

BURTON,  
C.J.O.

Judgment. BOYD, C.:—

BOYD, C.

The rule in administering assets which precludes one partner from proving and ranking as a separate creditor of his co-partner was established not so much with reference to the separate creditors as for the advantage of the joint creditors. Because, the joint creditors have the right to come in upon the separate estate of the one partner after his separate creditors are paid in full, and if the other partner were allowed to prove for a separate claim against his co-partner it would tend to reduce the amount of the (supposed) surplus available for the joint creditors. But if the reason for the rule disappears the rule itself goes; then there is no objection to the one partner proving for a separate debt against the separate estate of his co-partner in competition with his separate creditors. The rule first mentioned should not be applied in this case for two reasons, first, the estate of the deceased partner being administered is admitted to be insolvent as to his separate creditors (excluding the claim of the surviving co-partner), and, second, the estate of the surviving co-partner is solvent and is ample to meet all the unpaid joint claims of the firm; and there is a fund sufficient for that purpose now in the hands of the claimant Barber as trustee for these creditors.

Here the surviving partner has already paid over two-thirds of the joint debts and is thereby enabled to prove as a separate creditor to the extent of one-half thus paid, this half representing the share of the joint debts payable by the deceased partner, and as to which one was surety for the other: *Ex parte Watson*, 4 Madd. 477. Now, as explained very clearly in *In re Head*, [1894] 1 Q. B. 638, by a Judge admirably competent in such matters, "a partner seeking to prove against the estate of his co-partner will only come in competition with the joint creditors, who are of course his own creditors, in cases where the separate estate will yield a surplus, and he may so prove against the separate estate of his co-partner when it is plain there

is no surplus of such separate estate to distribute among the joint creditors": *per* Vaughan Williams, J., pp. 640, 641. See, also, *Ex parte Hind*, 62 L. T. N. S. 327.

Again, if the unpaid joint debts are so disposed of that they will not be proved but will be met and satisfied in some other way, that removes any objection to the proof as in this case: *Ex parte Andrews*, 25 Ch. D. 505.

I cannot agree in the judgment below, proceeding upon the application of a possible equity which cannot arise in the special circumstances of this case, in order to defeat the manifestly just claim of the appellant to come in as an ordinary creditor on the estate being administered: *Ex parte Gill*, 9 Jur. N. S. 1303.

The somewhat uncertain rules of equity so called which obtain in the bankruptcy cases should not be literally followed in this country when they work anomalous or uncertain results. We are not under bondage to such authorities as laying down general principles of equity, as I endeavoured to intimate in *Martin v. Evans*, 6 O. R. at pp. 242, 3.

The appeal should be allowed with costs throughout to the appellant out of the estate.

MACLENNAN, J. A. :—

I am of opinion that this appeal should be allowed.

It appears from the report of the Master, and it is not disputed, that Ruby's estate is insufficient to pay his separate debts excluding that which he owes to his co-partner, and that there is, therefore, no possibility of any surplus out of which the joint creditors can be paid anything whatever. In the judgments complained of the effect of that circumstance appears to have been overlooked. In such a case proof by the co-partner cannot come into competition with his own creditors, or diminish the fund out of which they are entitled to be paid, and the principle on which a proof by one partner against his co-partner's estate is excluded has no application. That is clearly stated

Judgment.  
Boyd, C.



Judgment. to be the law and the result of the authorities in the latest  
MACLENNAN, as well as in the earlier editions of Lindley, 6th ed., pp.  
J.A. 759-60, and 5th ed., p. 742. The principal case referred to by Lord Justice Lindley as authority for the law as he states it, is *Ex parte Topping*, 4 DeG. J. & S. 555, a decision of Lord Chancellor Westbury, which I think clearly supports his statement. In that case the Lord Chancellor allowed the proof, declaring that it would be unreasonable and unjust to refuse it when the estate of the partner against which it was tendered could not by any possibility yield a surplus: p. 557.

It is said, however, that inasmuch as Hilker has not paid the whole of the partnership debts his proof cannot be allowed. The way that matter stands upon the admission of the parties is this: [The learned Judge referred to the figures and continued:]

The question then is whether, because Hilker has not paid all the joint debts, he should not be allowed to prove for what is due to him by reason of those which he has paid. That the \$8,000 is due is not disputed, and that it is a separate debt is also admitted, therefore it would seem his claim to a share of his debtor's estate ought to stand as high as those of the other separate creditors, and to be paid *pari passu* as provided by R. S. O. ch. 110, sec. 32. The objection comes from the other separate creditors of Ruby and not from any joint creditor. No joint creditor has proved, for two very good reasons, first, because they are satisfied with Hilker's solvency, and next because there is no surplus of Ruby's estate for them. As stated by Lindley, L. J., in his treatise, 6th ed., p. 758, the rule of exclusion is for the benefit of the joint creditors and for them alone, and the reason for the rule ceasing, the rule is inapplicable. If there were here no joint creditors remaining, if they had all been paid by Hilker either out of the joint assets or with his own money, and if as the result of the partnership accounts a large sum was found due to him, there could be no question of his right to prove and be paid his due proportion. If there had been a surplus for the joint creditors,

and if they or any of them proved against the partner's estate, then Hilker could not compete with them, but it is competition with his own creditors which is forbidden and that alone. There is nothing of that kind here, and therefore I think his proof is good and should be allowed. I think the cases shew that where either there is no surplus for the joint creditors, or where, even if there be a surplus, yet if no joint creditor proves against it, a partner may prove against his co-partner's estate *pari passu* with the separate creditors of the latter. In *Ex parte Andrews*, 25 Ch. D. 505, it was held by the Court of Appeal that the rule of exclusion has no application unless there has been actually proved some debt in respect of which there was a joint liability. The reasoning on which that conclusion was reached leads to the other conclusion also that the rule is inapplicable where there is and can be no surplus for the benefit of joint creditors even if they or some of them have proved. Here, however, both conditions are found. The estate has been realised. There is and can be no surplus for the joint creditors, and if there were, no creditor has thought fit to offer proof.

Instead of complaining that Hilker has not yet paid all the creditors, I think the separate creditors are fortunate. If he had paid all, or had made an application for reasonable time to pay all, he could then prove for \$12,000, instead of \$8,000, whereby the dividend of the other creditors would be greatly reduced. As it is he must be taken to have abandoned any further claim.

With reference to the difficulty suggested by the respondents that the partnership accounts have not been taken, I think that is sufficiently overcome by the admissions, but if it were not I see no reason why the partnership accounts should not be taken in this matter, the necessary parties being present. This would have involved considerable expense perhaps, and the admissions were probably made to prevent that.

It was also argued on behalf of some of the respondents that because their claims consisted of trust money which

Judgment.

MACLENNAN,  
J.A.

**Judgment.** Ruby had paid into the firm, and of which the firm had received the benefit, the proof of Hilker's estate should be excluded. It is a sufficient answer to that contention that it was not shewn that Hilker knew or ought to have known of any breach of trust on the part of Ruby in respect of the money in question.

**MACLENNAN,**  
**J.A.**

The appeal should be allowed with costs.

**OSLER, J. A. :—**

Upon an examination of the authorities I am of opinion that the appeal should be dismissed on the grounds: first, that it is not shewn or admitted by any of the papers in the case which have been brought to my notice that the separate estate (to use that expression) of Ruby is insolvent excluding the debt he owes to his co-partner Hilker; and second, that the latter has not paid the partnership debts. He has paid part, but not all, and although his separate estate is liable and sufficient to pay the residue of the plaintiff's liabilities yet until he has done so or has done what is equivalent to and has been accepted as payment, he cannot, as the authorities demonstrate, rank upon the separate estate of his co-partner where that is not shewn to be insolvent so that the partnership creditors have no interest in it.

I refer to *Lacey v. Hill*, L. R. 8 Ch. 441; *In re Head*, [1894] 1 Q. B. 638; Lindley on Partnership, 6th ed., pp. 758-9; *Baker v. Dawbarn*, 19 Gr. 113.

*Appeal allowed, OSLER, J.A., dissenting.*

R. S. C.

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## BRIGGS V. WILLSON.

*Husband and Wife—Sale of Wife's Property—Retention of Proceeds by Husband—Trustee—Lapse of Time—Parties—Separate Estate.*

Where a house and land, the separate property of a married woman, were sold, and the proceeds taken and retained by her husband, who had never accounted for them :—

*Held*, in an action on a promissory note of the wife, twenty-six years after, that the husband remained a trustee for his wife of the proceeds, and the wife's claim constituted separate estate.

*Seemle, per MEREDITH, C.J.*, that where, in such an action, the plaintiff claims that the married woman is entitled to separate estate under a certain will, the Court will determine the point without requiring the other beneficiaries under the will to be added as parties.

THIS was an action brought by William Briggs, against Sarah A. Willson, and Arthur L. Willson, her husband, as makers of a joint and several promissory note in favour of the plaintiff for \$500. Statement.

Besides a general allegation in his statement of claim that the female defendant was the owner of separate property, the plaintiff also set up the will of James Mitchell, the father of the female defendant, under which he alleged that she was entitled to an interest constituting separate property, and asked for a declaration accordingly and equitable execution in respect to it.

The female defendant alleged in her defence that her interest under the will was not a vested interest, and was subject to restraint against anticipation, and the period for distribution under it had not arrived ; and submitted that the Court would not construe the will at the instance of a stranger who sets up a claim to be a creditor for the purpose of determining whether he could be a creditor or not, and especially when such claim was disputed, and was the gist of the action ; that the Court would not construe the will without the executors and trustees of it, and all parties interested in the questions raised for construction being made parties to the action ; and that the plaintiff could not stand in any higher or better position than herself in regard to taking proceedings for the construction of the will, and that it was provided by the will that if she

**Statement.** should take proceedings to have the will construed by the Court she should thereby forfeit all interest thereunder, and the plaintiff must stand in the same position.

The action was tried before MEREDITH, C. J., at the Toronto Autumn non-jury Sittings on September 8th, 1896.

To prove separate estate probate of the will of James Mitchell was put in by the plaintiff and evidence was given as to the possession by Sarah A. Willson of furniture of small value, and also as to the Church street property mentioned in the judgments.

September 8th, 1896. MEREDITH, C. J. :—

I think apart from the Mitchell will there is enough here to make the female defendant liable. I am not deciding this except as to her. I think there is no question whatever that I have a right and am bound to determine on this record whether the estate given by the will is such an estate as is separate under the provisions of the statute. It would be an extraordinary and anomalous condition of things if, when an action is brought for the purpose of making a woman liable upon her contract, the person bringing it had to be plunged into litigation with all those named in the will in order to determine what their rights were. I do not think that is the law. I think a decision here as to her having separate property is conclusive for the purposes of this action though it leaves the question as to the other beneficiaries entirely open. However, I do not think it is necessary to determine that this is separate estate. I think it is shewn by the evidence of the defendant herself, that she has separate estate in addition to the furniture which, according to the cases which Mr. Mills has cited, would not in itself be sufficient to bring the case within the statute. There is evidence that this defendant was possessed of property on Church street which was converted into money some years ago, and the

proceeds received by her husband. I think there is sufficient evidence against her upon her admission, especially as the husband is not called for the purpose of denying the claim she sets up, to shew that she has a claim against her husband for the proceeds of the property. As I understand the law, the proceeds of the capital of the wife, received by the husband during the marriage, are received by him upon trust for the wife, unless he is able to shew it was a gift from the wife to him. A different rule prevails with regard to infants. Here not only is there no evidence that it was a gift, but the evidence is the other way. The wife expected, at all events, that she was not giving it, and that she would have a claim against her husband. I think there must be a judgment for the plaintiff for the amount of the claim and interest in the usual form as to the separate estate.

Judgment.

MEREDITH,  
C.J.

The defendant Sarah A. Willson appealed from this judgment to the Court of Appeal, on the ground that she was not possessed of any free separate property at the time of signing the promissory note in question; that the furniture in evidence was insignificant in value and all exempt from seizure under execution; that the Church street property which was sold over twenty-two years ago, had been owned by the defendants jointly, and the purchase money was paid in instalments, and was used for the support of the family and for like purposes, and she got the benefit thereof, and it never was intended that there should be any debt by her husband to her in respect thereof; that further, if there ever was a debt in respect of that property it was barred by the Statute of Limitations; and that her interest under the will of her father (if any) was contingent and not vested, and was subject to restraint against alienation, and against anticipation.

The appeal was heard before the second division of the Court of Appeal, consisting of BOYD, C., and FERGUSON and MEREDITH, JJ., on February 5th, 1897.

**Argument.** *G. Mills*, for Sarah A. Willson, the appellant. The furniture is too trifling to fix liability: *Abraham v. Hacking*, 27 O. R. 431; *Mulcahy v. Collins*, 24 O. R. 441; *In re Whittaker*, *Whittaker v. Whittaker*, 21 Ch. D. 657. As to the Church street property the Statute of Limitations bars the debt: *Weldon v. Neal*, 32 W. R. 828; Lush on the Law of Husband and Wife, 2nd ed., pp. 317, 397-8, 463-4; *In re Lady Hastings*, *Hallett v. Hastings*, 35 Ch. D. 94; Banning on Limitation of Actions, 2nd ed., pp. 203-7. The statutes to be referred to are: 35 Vict. ch. 16, sec. 9 (O.); 47 Vict. ch. 19, sec. 11 (O.); R. S. O., [1877] ch. 125, sec. 20; R. S. O., [1887] ch. 132, sec. 14. The onus is on the plaintiff: *Palliser v. Gurney*, 19 Q. B. D. 519.

*Maclaren*, Q. C., for the plaintiff. The furniture, we admit, would probably not be sufficient as separate estate: *Braunstein v. Lewis*, 64 L. T. 265; *Bonner & Co. v. Lyon*, 38 W. R. 451. Under the will, however, she takes separate estate. Besides the debt in respect to the Church street property is enough notwithstanding the Statute of Limitations.

*Mills*, in reply. The husband sold the wife's property on Church street and got the money. [FERGUSON, J.—But was not the money received to her use, and unlike money given by a wife to her husband, as in *Dufresne v. Dufresne*, 10 O. R. 773, and *Hopkins v. Hopkins*, 7 O. R. 224?] She allowed him to keep it, and it was used for general purposes and can a claim be set up for it after twenty years?

The judgment of the Court was delivered on June 21st, 1897, by

BOYD, C.:—

The wife had property given her by her father "a long time ago." It was a lot on Church street which was sold and the proceeds (\$1,500) were taken by her husband. There was no arrangement made about it, and the wife

always supposed she would get something out of it, but never did; she supposed and believed it would come back to her some time. The marriage was in 1863, and this sale of the land was about 1875.

Judgment.  
Boyd, C

This was unquestionably separate estate of the wife then, and has so continued in the shape of a claim against the husband, unless proof to the contrary is made by the husband on whom the onus lies as to principal money: *In re Flamank, Wood v. Cock*, 40 Ch. D. 461.

A new trial was asked for in order to set up the Statute of Limitations in regard to the claim, or give other evidence to shew acquiescence or renunciation on the part of the wife.

It would be a dangerous precedent to allow that class of parol evidence, at this stage of the proceedings, as between husband and wife, and it would appear that the Statute of Limitations is not pertinent to such a transaction, if the husband knew that what he received was the separate estate of the wife, as he must have done in this case, and if he still holds the proceeds in the sense of never accounting for them to her: *Wassell v. Leggatt*, [1896] 1 Ch. 554. In the origin of the transaction he would make himself a trustee for his wife, and having converted the proceeds to his own use he would not be entitled to the benefit of the 13th section of the Trustees Act of 1891, 54 Vict. ch. 19 (O.).

It was held under *Carroll v. Fitzgerald*, 5 A. R. 322, that notwithstanding the then law a married woman might sue alone for separate property as if it belonged to her as an unmarried woman, yet that did not prevent her from waiting till she was discoverd before suing, and that she was not barred by the Statute of Limitations. Since then the law has been changed, and the provision now is that she shall have in her own name the same remedies for the protection and security of her separate property, even as against her husband, as if such property belonged to her as a *feme sole*: R. S. O. ch. 132, sec. 14.

But even that does not go far enough to prevent her



**Judgment.** from proceeding against her husband as a trustee after the lapse of the usual period of limitation for ordinary actions, if the property has been retained by the husband as here.

**Boyd, C.**

The very point appears to be covered by Mr. Justice Romer's decision secondly cited, and he there considered the effect of the English clause of the Married Woman's Property Act of 1882, 45-46 Vict. ch. 75, sec. 12, from which ours in the Revised Statutes of 1887 is substantially though not literally taken.

I would, therefore, affirm the judgment with costs.

A. H. F. L.

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### OSTROM V. SILLS.

*Water and Watercourses—Surface Water—Easement—Lands of Different Levels.*

The doctrine of dominant and servient tenement does not apply between adjoining lands of different levels so as to give the owner of the land of higher level the legal right as an incident of his estate to have surface water falling on his land discharged over the land of lower level although it would naturally find its way there. The owner of the land of lower level may fill up the low places on his land or build walls thereon although by so doing he keeps back the surface water to the injury of the owner of the land of higher level.

Judgment of a Divisional Court reversed.

**Statement.** THIS was an appeal by the defendants from the judgment of a Divisional Court [BOYD, C., FERGUSON, and MEREDITH, JJ.]

The following statement of the facts is taken from the judgment of MOSS, J. A.

The locus of this litigation is the unincorporated village of Frankford, situate in the township of Sidney, in the county of Hastings, at the confluence of the river Trent and its tributary, Cole creek. It is not shewn when the farm lots on which the village is situate were first laid out in streets and building lots, but in some of the conveyances put in there is reference to a plan of part of the village

made in 1837, by one G. S. Clapp, P. L. S., and to a plan of the village made by one J. D. Evans, P. L. S. The evidence shews this latter plan to have been made in 1870. Statement.

The plaintiff and the defendants are the proprietors of adjoining parcels of land fronting on the south side of a highway called Mill street, and extending south to the waters of Cole creek. The plaintiff's premises have a frontage of about twenty feet on Mill street, and are wholly covered by a building used by him as a chemist's shop and dwelling.

At a distance of sixty-eight feet from the north-east corner of the plaintiff's building is Trent street, a highway running north and south and intersecting Cole creek, at a distance of forty-three feet from the corner of Mill and Trent streets. Immediately to the west of the plaintiff's building are the premises of the defendants. They consist of a considerable parcel of land with a frontage of about 166 feet on Mill street, on which are now erected two buildings, one a storehouse or warehouse, the other a grist mill. When the plaintiff acquired his property—in the year 1872—the defendants' land was vacant, though there had been on the westerly portion a grist mill which had been burned down. When the defendants purchased, there was a covered ditch or drain crossing Mill street from the north side, and discharging upon the defendants' premises at a place to the east of the site of the old grist mill.

It conducted water, which was collected on the north side of Mill street by means of ditches and drains constructed by the municipality and land owners, across the highway and discharged it upon the premises now owned by the defendants over which it flowed to Cole creek. The covered drain was constructed of floats or logs placed atop of one another, forming a box or pipe about eighteen inches wide and eight or ten inches in height, covered over by planks on which were put earth and gravel to the level of the highway. It had been placed there probably twenty or more years before. There had been on the

Statement. ground at this place a shallow depression into which the surface waters from the surrounding lands flowed.

This depression extended from north of the highway, across it and on to the lands now owned by the defendants, and the construction of the box drain was the work of the township authorities done for the purpose of improving the highway by gathering the waters into a convenient conduit and levelling the highway. By these means the waters were concentrated and brought to the defendants' lands in enhanced volume and discharged with increased force. The land sloped gradually from the south side of Mill street to Cole creek, and the water coming through the covered drain cut away the earth and formed a sloping course along which it was found convenient for persons in vehicles to drive down to Cole creek, and there ford the stream. In 1875, considerable alterations and improvements were put upon the drain by the township authorities. It was thought to be of insufficient capacity to carry away all the water collected on the north side of Mill street. It was too near the surface, and was liable to freeze up in cold weather. The bottom of a ditch running along the north side of Mill street from the west, which took and conveyed surface waters from lands to the north of the street and west of where the box drain crossed the highway, had become worn to a level below that of the bottom of the box drain. To remedy these defects, a wider and deeper excavation was made. A trench more than two and a half feet wide was cut down to the rock. The sides were built up with loose stone to a height of about twenty inches, and the top was covered with two inch planks, upon which was put earth to the level of the crown of the highway, thus producing a culvert two and a half feet wide by about twenty inches high, with its bottom something more than four feet beneath the surface of the highway. It connected with the ditch or drain on the north side of Mill street, and extended beyond the south limit of the highway for a distance of twelve or fifteen feet into and upon the defen-

dants' premises. The discharge from its mouth was into the same place as the discharge from the box drain, and the water from it found its way to Cole creek in the same direction and along the same course as formerly; but the quantity of the discharge was apparently materially increased, and the effect of its action was to cut a much more defined channel from the mouth of the culvert through the defendants' premises to the creek; and if there was a servitude in respect of the former drain, it was largely increased by the new culvert. The water formerly brought to and discharged through the box drain thereafter through this culvert, was chiefly surface water collected by means of drains or ditches and conducted to a ditch or drain constructed by the municipality, along the north side of Mill street, which at one time conducted water from west of King street, but for the past fifteen or more years only from a point to the east of the eastern side of King street. At one time there was an occasional accession of water from an overflow in the freshet of a pond situate on the corner of Albert and Scott streets, some distance to the north and west of the corner of King and Mill streets, but this was cut off about the year 1890, by a drain constructed by the municipality. There was also an occasional overflow from a pond situate some distance to the north of Mill street, nearly on a line with the point where the culvert crosses Mill street, but about the year 1884 this also was cut off, and the waters drained to the Trent river.

One Chapman, who owns a parcel of land on the north side of Mill street, directly opposite the defendants' premises and through whose premises was the natural depression above spoken of, put down a drain from his premises and cellar about the year 1868, and thereby conducted to the drain on the north side of Mill street the waters collected by means of his drain. But these and nearly all the other waters that flowed through the culvert were waters cast upon the surface of the ground in the shape of either rain or melted snow, and the quantity

**Statement.** consequently varied very considerably, there being sometimes a very considerable volume, while at others, and for the most part, the discharge was comparatively small and intermittent.

This was the state of things when in 1887 the defendants commenced the erection of the building in respect of which the controversy has arisen and which is generally spoken of in the evidence as the storehouse or warehouse. It is a brick structure upon a stone foundation, its eastern wall coming within a few inches of the western wall of the plaintiff's building and extending south to Cole creek. The south wall extends to the west about thirty-four feet. The western wall extends northward from the south wall to within about ten feet of the south line of Mill street. It is then turned to the east a distance of about ten feet, and is then turned to the north about ten feet to the south line of Mill street. The north or front wall extends easterly along or slightly over the street limit to the east wall. There is thus formed at the north-west corner of the building what is spoken of as an "L," about ten feet square. There is left between the warehouse and the grist mill an alleyway about ten feet wide. The culvert came upon the defendants' premises near the corner formed by the west wall of the "L." In excavating for the foundation of the warehouse, the defendants cut away the planks covering the culvert and removed its stone walls for some distance, and built the foundation wall across its course, from the rock upwards to some distance above the level of the street, but did not move the culvert back to the line of the street, and its point of discharge was still upon the defendants' premises. The superstructure was completed in 1888, and then the defendants, in order, as they say, to protect their foundation wall from the waters coming through the culvert and to conduct them to Cole creek, removed the stone walls of the culvert to the line of the street, and made an excavation in a diagonal line from the corner of the "L" fronting on Mill street, to the lower corner on the alleyway and placed a barrier of planks

across the base of the "L" from the rock up to above the level of the street. The space behind this barrier, and between it and the foundation wall, was filled up with earth and gravel. The space in front was not filled in, but on the contrary, the defendants say they caused a cutting to be made from the drain to the alleyway so as to conduct the water coming from the culvert to the alleyway, and enable it to flow down it to the creek. Whether this provision for carrying off the water would have been sufficient if it had continued, is not known, for before long the space in front of the barrier began to be filled up with earth, stones, ashes, and other debris thrown or collected there without the action or consent of the defendants, so that in less than a year the mouth of the culvert was completely covered and stopped up, and the space became filled almost if not wholly to the level of the ground. The effect of this was to entirely stop the flow of water from the culvert. In 1890, upon occasion of heavy rains, water began to come in to the plaintiff's cellar through the walls at the north-west corner of his building, more particularly in the west wall, and this continued from time to time up to the time of the commencement of this action on the 6th of September, 1892. Statement.

The plaintiff says that at first he was under the impression that this was due to surface water collecting on the street in front in consequence of the construction of certain crossings and the heightening of the crown of the roadway. With a view to protecting his building from such surface water, he dug a drain commencing in front of his building and going in the direction of the culvert, intending to conduct the surface water to it. In the course of the excavation he says he discovered for the first time that the flow through the culvert was stopped, and that water was collected about its mouth. He now claims that some of this water found its way along by the front foundation wall of the defendants' building, and thence to the walls of the plaintiff's building, and by oozing through them led to some of the damage he now complains of.

**Statement.** He also claims that by reason of the stoppage of the mouth of the culvert, surface water is forced through the windows into his cellar, and to this he appears to attribute the greater portion of his damage. In his evidence he thus states his theory of the cause of the trouble :—

[The learned Judge read extracts from the plaintiff's evidence and continued :]

From these extracts it is apparent that the plaintiff's own chief complaint is of the obstruction or prevention of the flow of surface water from in front of the plaintiff's premises and building, into the culvert, and through it over the defendants' premises.

Some of the witnesses on behalf of the plaintiff attribute the trouble to the soakage of the water brought through the culvert from across Mill street, arising from its flow being blocked and thereby prevented from going down over the defendants' premises. It is said that it percolates through the soil along the front of the defendants' building until it reaches the foundation wall of the plaintiff's building, a distance of twenty-four feet. In either aspect the trouble seems to come from the arrest of the flow of surface water brought by artificial means to the defendants' premises. And the plaintiff's contention is that the defendants are not at liberty to block up on their own premises the outlet of the culvert so as to interrupt or prevent the flow of water through and from it over their premises to Cole creek, if the result is to occasion damage to the plaintiff's premises.

The defendants counterclaimed for damages alleged to have been caused to them by the plaintiff's interference with Cole creek, but it is not necessary to set out the facts as to this.

The action was referred to the Master at Belleville, who found in the plaintiff's favour on his claim, assessing the damages at \$100, and found against the defendants' counterclaim.

On appeal, FALCONBRIDGE, J., reversed the Master's find-

ing as to the claim, and dismissed the action, and he affirmed the finding as to the counterclaim. Statement.

The Divisional Court restored the Master's finding as to the claim, and also affirmed his finding as to the counterclaim.

The defendants then appealed to this Court against both findings, and the appeal was argued before BURTON, C. J. O., and OSLER, MACLENNAN, and MOSS, JJ. A., on the 25th and 26th of May, 1897.

*Clute, Q. C., and J. Williams*, for the appellants.

*C. J. Holman, and E. Guss Porter*, for the respondent.

September 14th, 1897. MACLENNAN, J. A.:—

On the argument we disposed of the defendants' appeal on their counterclaim by dismissing it, deciding that there was no evidence of injury to their riparian right. The other appeal, against the judgment for the plaintiff for injury to his walls and cellar by the obstruction to the flow of water from the culvert, remains to be considered.

The action was commenced in September, 1892, and the complaint is, that four years before the action the defendants obstructed a drain or sewer by which surface water and drainage of a street and adjoining lands had been accustomed to flow, whereby it was backed up and caused to flow towards the plaintiff's land, and to percolate through the walls of his dwelling house and shop, and into his cellar, to his injury. There is no allegation of any natural watercourse, but what is alleged is, that "the natural and regular flow of surface water of the plaintiff's land and of the street upon which both the plaintiff and the defendants' land abut, was over and through the defendants' land, and that such flow has existed from time immemorial, or for such length of time for the plaintiff and others enjoying the street and lands on a higher level to acquire, and that they did acquire, an easement for drainage over the defendants' lands." The learned referee has found as a fact that what the statement of claim calls a drain or



**Judgment.** sewer was a natural gully or watercourse which had existed for many years on the north side of Mill street, and extending diagonally across it, and which emptied into Cole creek, and which was formed by the natural action of the water; and that for at least fifty years this gully or watercourse has been the natural outlet for water forming on the land lying to the north of Mill street. The witnesses called upon this point were very numerous, and, without referring to their evidence in detail, I am bound to say that in my opinion it falls far short of establishing anything that can properly be called a legal watercourse, or anything more than a mere ditch or drain or sewer artificially constructed on the north side and across the street. The witnesses speak of it as a ditch or drain, and those who speak of its condition before work of excavation, say there was a depression. In my judgment there is no evidence whatever of the existence of a watercourse before the excavation made for the purpose of improving the street. That being so, the defendants had an undoubted right to object to having the water coming from or across the highway cast upon their land: *McGillvray v. Millin*, 27 U. C. R. 62, and other cases; and to protect themselves against it by a wall or other obstruction. No case of prescription has been made against the defendants: *Gale's Law of Easements*, 6th ed., p. 589; *Goddard's Law of Easements*, 4th ed., pp. 198-9; *Parker v. Mitchell*, 11 A. & E. 788; *Lowe v. Carpenter*, 6 Exch. 825; even if the plaintiff could avail himself of it.

The judgment of Mr. Justice Falconbridge ought, therefore, to be restored, and the defendants should have their costs, both of their appeal to the Divisional Court and to this Court, the plaintiff being entitled to the costs of those appeals in respect of the counterclaim, to be set off against those of the defendants.

Moss, J. A. :—

The plaintiff's contention appears to be based on the propositions that he has an absolute legal right to require

the defendants to submit to the flow from the culvert of the water coming through it from the surrounding lands, as in the case of a natural watercourse, or that a prescriptive right to require the defendants to permit the continuance of the flow of such water over their lands has been acquired against the defendants, of which the plaintiff can avail himself, or that the defendants have no right to block the flow of the water through the culvert in such manner as to cast it or some of it on the plaintiff's premises to his damage.

Judgment.

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Moss,  
J.A.

The subject of the right of an upper proprietor to have the surface water from his lands flow upon those of his lower neighbour, has been a matter of much discussion and difference of opinion, especially in the American Courts.

The doctrine of the civil law that the right of drainage of surface water as between the owners of adjacent lands of different elevations, is governed by the law of nature, and that the lower proprietor is bound to receive the waters which naturally flow from the estate above, provided the industry of man has not created or increased the servitude, has been accepted and followed by the Courts of Pennsylvania, Illinois, California, and Louisiana, and some other States. On the other hand, the Courts of New Jersey, New York, Massachusetts, New Hampshire, Wisconsin, and some other States, reject it and hold that the relation of dominant and servient tenements does not by the common law apply between adjoining lands of different owners so as to give the upper proprietor the legal right, as an incident of his estate, to have the surface water falling on his land, discharged over the land of the lower proprietor, although it naturally finds its way there, and that the lower proprietor may lawfully, for the improvement of his estate, and in the course of good husbandry, or to make erections thereon, fill up the low places on his land, although by so doing he obstructs or prevents the surface water from passing therein from the premises above, to the injury of the upper proprietor.

Judgment.Moss,  
J.A.

In Washburn on Easements, 4th ed., p. 489, the learned author, referring to and commenting on many cases in which the conflicting views are set forth, notices the tendency there has been of late and since former editions of the work, to limit the servitude which a lower field owes to an upper one in respect to water, to such as flows in a defined watercourse, and not to extend it to such as falls upon the surface in the form of rain or melting snow, although from the nature of the surface such water, when it does fall, flows in a uniform course or direction.

It is also to be noted that, even in the Courts where the doctrine of the civil law prevails, a distinction has been made in the case of building lots in cities, towns, and villages.

The case of *Bentz v. Armstrong*, 8 Watts & S. 40, is illustrative of this exception. It was there determined by the Supreme Court of Pennsylvania, that "in the purchase of lots of ground laid out and sold for the purpose of building up towns or cities thereon, it has been understood, and such has been the practice and usage, that the natural formation of the surface will, and indeed must, necessarily undergo a change in the construction of the buildings and other improvements that are designed and intended to be made; and that in doing this, an owner of a lot ought to be permitted to form and regulate the surface of it as he pleases, either by excavation or filling up, as may be requisite to the convenient enjoyment of it, taking care, however, not to produce any detriment or injury to his neighbour in the occupation of his adjoining lot."

In that case, Bentz and Armstrong were owners of adjoining lots fronting on Quarry street in Pittsburg. Upon Armstrong's lot there was a spring, and, in consequence of a natural descent in the ground, the water from this spring and from Armstrong's house and lot, ran over the lot of Bentz, who placed an obstruction on his own lot so as to prevent the water running on it from Armstrong's lot. The consequence was the obstruction caused the water to run back into Armstrong's cellar. For this he brought

action, and succeeded in the Court below, but the Supreme Court held he had no cause of action.

Judgment.

Many American authorities on this subject are collected in the American and English Encyclopædia of Law, vol. 24, p. 896.

Moss,  
J.A.

In the case of *Inhabitants of Franklin v. Fisk*, 13 Allen 211 (1866), there was a bill in equity to restrain the defendant from obstructing a culvert built by the plaintiffs across a highway.

The highway in question had been laid out more than forty years, and led up a steep hillside, over which large quantities of surface water flowed. It had usually flowed down on the upper side of the highway, but, apparently not long before the commencement of the suit, the plaintiffs built a stone culvert across the highway, extending to the inside of the wall between the highway and the defendant's land, and dug a slight trench from the mouth of the culvert two or three feet into the defendant's land to carry off the water. The defendant made a dam on his own land at the end of the culvert and stopped up so much of the culvert as was under his wall, and thereby prevented much of the surface water from flowing through the culvert and caused it to flow over the highway and injure the travelled road. It was held by the Supreme Court of Massachusetts that the defendant was entitled to do the acts complained of. The Court affirmed the doctrine previously held in *Gannon v. Hargadon*, 10 Allen 106, that as against an adjoining owner of the fee, the defendant would have had the right to raise the surface of his land or build a structure upon it so high as to prevent any surface water from coming upon it from the adjoining land, and held that the public had no greater right to restrain him in the use of his land than they would have had if they had been absolute owners of the land included in the highway.

In conclusion, it said: "The right of adjoining proprietors to erect structures upon their land up to the line of their highway is exercised every where; and the defen-

Judgment.

Moss,  
J.A.

dant has the same rights in this respect as if his land were in the midst of a village or city. If by legal acts, done upon his own land, he has prevented the water from passing off the highway through the plaintiffs' culvert, their only remedy is to dispose of their surface water in some other way."

This doctrine was again affirmed by the same Court in *Bates v. Smith*, 100 Mass. 181 (1868).

In *Swett v. Cutts*, 50 N. H. 439 (1870), the plaintiff and defendant were adjoining owners of land by the side of a highway, in the ditch of which water was accustomed to accumulate, and for many years it found its way off through a depression in the defendant's lands. The defendant built an embankment in front of his highway fence which caused a portion of the water, which would otherwise have gone over his land, to go over the plaintiff's land, causing damage to the plaintiff's land. The Supreme Court of New Hampshire held that in the absence of a prescriptive right the plaintiff had no cause of action against the defendant. In support of its conclusions the Court makes reference to many English and American authorities.

In *Hoyt v. City of Hudson*, 27 Wis. 656 (1871), the Supreme Court of Wisconsin had to deal with the case of an action against a municipality for damages occasioned by the obstruction of the flow of surface water down a ravine or hollow on the plaintiff's premises, by reason whereof the water was cast back and retained on the plaintiff's lands.

The Court concluded upon the evidence that there was no stream or watercourse through which the water flowed in and upon the plaintiff's premises. It adhered to the views expressed by the same Court in *Pettigrew v. Village of Evansville*, 25 Wis. 223 (1870), which "rejected the doctrine of dominant and servient heritage of the civil law, and adopted the very opposite doctrine of the common law of England, as held and expounded by the Courts of that country, and also by those of our own American States." It stated the doctrine of the com-

mon law to be that (p. 659) "there exists no such natural easement or servitude in favour of the owner of the superior or higher ground or fields as to mere surface water, or such as falls or accumulates by rain or the melting of snow; and that the proprietor of the inferior or lower tenement or estate may, if he choose, lawfully obstruct or hinder the natural flow of such water thereon, and in so doing may turn the same back upon or off on to or over the lands of other proprietors, without liability for injuries ensuing from such obstruction or diversion. This is the rule in England, and in Massachusetts, New York, Connecticut, Vermont, New Jersey, and New Hampshire."

Judgment.

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Moss,  
J. A.

The doctrine of the civil law has not been adopted by the Courts of this Province. As regards mere surface water precipitated from the clouds in the form of rain or snow, it has been determined that no right of drainage exists *jure naturæ*, and that as long as surface water is not found flowing in a defined channel with visible edges or banks approaching one another and confining the water therein, the lower proprietor owes no servitude to the upper to receive the natural drainage: *McGillivray v. Millin*, 27 U. C. R. 62; *Crewson v. Grand Trunk R. W. Co.*, 27 U. C. R. 68; *Darby v. Crowland*, 38 U. C. R. 338; *Beer v. Stroud*, 19 O. R. 10; *Williams v. Richards*, 23 O. R. 651; *Arthur v. Grand Trunk R. W. Co.*, 25 O. R. 37; 22 A. R. 89.

Generally speaking the upper proprietor may dispose of the surface water upon his land as he may see fit, but he cannot, by artificial drains or ditches, collect it or the water of stagnant pools or ponds upon his premises and cast it in a body upon the proprietor below him to his injury. He cannot collect and concentrate such waters and pour them through an artificial ditch in unusual quantities upon his adjacent proprietor.

If, however, he does so for a sufficient time, and under appropriate circumstances, he may acquire a prescriptive right as against his lower neighbour, which would prevent

Judgment.

Moss,  
J.A.

him from doing any act to put a stop to the easement thus acquired.

But as respects the plaintiff's claim in this action, it is not a case of a natural watercourse flowing through or from his premises, nor of prescriptive right of which he can take advantage. The Master's findings shew that the surface of the ground, in the locality served by the culvert, has not been left as in a state of nature; much has been done both by individuals and the municipality in the way of gathering and concentrating the waters and conducting them into artificial channels, and for that purpose the natural channels have been altered, enlarged, or entirely displaced by other provisions for carrying away the waters which in a natural state came into the depression where it crossed Mill street. They also shew that the portion crossing Mill street was substantially altered. The Master finds that the covered portion was originally covered to improve the roadway on Mill street, there being a depression where such watercourse crossed the street, which interfered with the user of the street, and, as originally constructed, was composed of floats or logs laid down on either side and covered over with planks and earth; the centre of the watercourse being down to the rock with the sides or banks sloping; and that in 1875, when the grant was obtained from the municipal council, the original construction, or what was left of it (it having been repaired often before), was taken away, and in place of the floats or logs along the sides, the sloping banks were dug out or squared up and a dry stone wall laid in their place upon which timbers were placed, and plank covering and earth placed over them. This is the culvert before spoken of, and there is no doubt it was a considerable enlargement of the former covered drain in width and depth, and consequent carrying capacity. Being constructed in 1875, there was not a lapse of twenty years before the commencement of this action. So that as regards it, neither the municipality nor the proprietors on

the north side of Mill street had gained any prescriptive right against the defendants. Besides, there had been an interruption, acquiesced in so far as appears by these parties, for more than a year before the action. The defendants' obligation, if any, was to refrain from stopping up the natural watercourse while it remained such. But that servitude could not be increased and made obligatory upon them except by lapse of time, and, on the footing of prescription, could only be enforced by the parties by whom the easement was gained. The water from the plaintiff's premises did not naturally flow to the defendants' premises in a defined channel, thereby casting them upon the defendants' premises, nor did the plaintiff, or those through whom he claims, gain a right by prescription to cast them upon the defendants' premises.

Judgment.

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Moss,  
J.A.

The plaintiff's right, if any, to maintain this action, depends therefore upon whether he has a right to complain of the effect upon his premises of the defendants stopping or preventing the flow on to their premises of water brought there by other persons than the plaintiff, and from other lands than those owned by him.

The Master has found that some portion of the damage which the plaintiff has suffered from water in his cellar, was caused by the defendants' building obstructing the outlet of the culvert, and thereby causing the water coming from it to back, and some of it to find its way to the plaintiff's cellar wall and into his cellar, and that some of the damage has been caused by the surface water of the street coming into the cellar windows; and he has assessed the whole damage to the plaintiff arising from the former cause since the erection of the defendants' building in 1888, to the date of the report (see Con. Rule 680, now 552), at the sum of \$100. Accepting this finding upon the conflict of testimony as conclusive of the fact that the plaintiff has sustained some, though not much damage, by reason of the defendants' building on their own lands, the question of legal liability remains.



**Judgment.**

Moss,  
J. A.

I have given the matter much anxious consideration, but I have been unable to come to the conclusion that the plaintiff is entitled to judgment on this ground any more than on the other grounds.

I think that the defendants are entitled to judgment, because in doing what is complained of they are protecting themselves against the acts of other parties by means of something put up on their own land as a barrier, and not as a medium for conducting the waters from their premises to, and casting them upon, the plaintiff's premises; and because the defendants are making a reasonable and natural user of their own premises in building upon their lands, and in doing so they are not exceeding their proprietary rights; and because, if the plaintiff is suffering damage, it is by reason of the attempt of the municipality, and others not parties to this action, to dispose of their surface waters and drainage by unwarrantably casting them on the defendants, thereby seeking to impose a burden upon them, which they are properly resisting.

The water now gathers, not on the defendants' lands, but in the culvert under the highway, and thus apparently some of it finds its way by soakage through the stone sides of the culvert, for a distance of twenty-four feet or thereabouts, from where it formerly entered the defendants' lands, to the cellar walls of the plaintiff's building; but the defendants, not being bound to permit the discharge of the culvert on to their premises, owe no responsibility to the plaintiff for the want of proper provision by the municipality for an outlet.

It does not appear that either the municipality or any upper proprietor along the line of the watercourse is objecting to the defendants' acts; and for all that does appear they may be acquiescing in the defendants' claim of right to block the outflow of the culvert, and prevent the acquisition of an easement. And I do not think that the plaintiff is entitled to assert as against the defendants the rights which the municipality or the upper proprietors may have possessed.

I think that the appeal ought to be allowed, the judgment of the Divisional Court reversed, and the judgment of Falconbridge, J., restored with costs here and in the Divisional Court.

Judgment.  
Moss,  
J.A.

BURTON, C. J. O., and OSLER, J. A., concurred.

*Appeal allowed.*

R. S. C.

### ARMSTRONG V. LYE.

*Principal and Agent—Attorney for Sale of Land—Direction to pay Advances out of Proceeds—Attorney Subsequently Purchasing—Personal Liability of Attorney—Equitable Assignment—Acknowledgment—Registry Act—Notice.*

The attorney under an irrevocable power from the owner for the sale or other disposition of certain lands, and entitled in the event of sale to a share of the proceeds after payment of charges, agreed to pay out of the owner's share of the proceeds, when received, the amount of a further charge made by the owner, and subsequently purchased the lands himself :—

*Held*, that he was not personally liable to pay the amount of the charge. Judgment of a Divisional Court, 27 O. R. 511, reversed, MACLENNAN, J.A., dissenting.

Execution of the document creating the further charge was proved by affidavit and attached to it but without any proof of execution were the agreement by the attorney to pay the charge and a transfer by the chargee to the plaintiff of the charge, and all the documents were accepted by the Registrar and registered :—

*Held*, affirming the judgment of a Divisional Court, 27 O. R. 511, that the defect in registration was cured by section 80 of the Registry Act, R. S. O. ch. 114, and that the attorney, who subsequently became the purchaser of the lands in question, was affected with notice of the plaintiff's rights.

THIS was an appeal by the defendant Lye from the judgment of a Divisional Court [ARMOUR, C.J., FALCONBRIDGE, and STREET, JJ.], reported 27 O. R. 511, where the facts are stated, and was argued before BURTON, C.J.O., and OSLER, MACLENNAN, and MOSS, J.J.A., on the 21st and 27th of May, 1897.

J. B. Clarke, Q.C., and F. A. Hilton, for the appellant.

W. Read, for the respondent Hutchins.

Watson, Q.C., and R. Ruddy, for the respondent Armstrong.

Judgment. September 14th, 1897. Moss, J.A. :—

Moss,  
J.A.

I agree that Lye is affected with notice of the plaintiff's charge upon the lands in the township of Rankin and cannot shield himself against the claim behind the plea of purchaser for value without notice.

I also agree that the plaintiff is entitled to a charge for the whole sum of \$1,025 with interest.

The remaining questions are as to the personal liability of Lye to pay to the plaintiff the amount of his claim and to indemnify Mrs. Hutchins against her liability therefor.

The determination of these questions must turn upon the effect of the transaction between Lye and Rankin, evidenced by the conveyance of November 1, 1892, and the contemporaneous and other instruments to which they were parties.

It is conceded on all hands, and there appears to be no doubt, that nothing which occurred from the 20th October, 1891, to the 1st of November, 1892, altered or affected the position or rights of the plaintiff.

On the 8th of May, 1891, Rankin was the owner of the lands in question, as well as other lands in the town of Windsor. Over them all there was a mortgage held by Gooderham, and a charge in favour of Boswell and Cameron, or Boswell, Cameron and Pearson, and in an action upon the mortgage the lands were to be offered for sale on the 9th of May, 1891. On the 8th of May an agreement was entered into between Lye and Rankin, the effect of which was to bind Rankin to relieve Lye from certain liabilities and obligations he agreed to undertake with Gooderham, and also to pay him \$500 within three months, but in default Lye was to become the irrevocable attorney for sale of the mortgaged property, empowered to receive and deal with the purchase money as provided in the agreement, receiving and retaining out of the purchase moneys remaining after payment of the prior charges one-third part thereof as his remuneration.

Five days after this agreement Rankin signed the instrument of the 13th of May, 1891. By this instrument he creates a charge upon his interest in the lands in the township of Rankin only, to the extent of \$1,200, in favour of any person advancing money to that extent to his niece, Mrs. Hutchins. And inasmuch as there is a contingent possibility of the lands being sold by Lye in the event of default by Rankin in performance, during the coming three months, of the terms of the agreement of the 8th of May and because it is felt that the creation of the charge could not interfere with or prevent a sale and conveyance to a purchaser through Lye, and it was not desired that it should do so, Lye is authorized in the event of a sale and the receipt of purchase money under his power of attorney, to pay the amount of the advance out of Rankin's share "of the proceeds of such sale or other disposition of the property."

Judgment.

Moss,  
J.A.

The effect of this is that while the lands in the township of Rankin remained unsold, Rankin's interest in them would stand charged with the amount advanced to Mrs. Hutchins, but in the event of a sale being effected by Lye as attorney for Rankin the charge would become converted into a claim against Rankin's share of the purchase money. It was not intended that the charge should operate to interfere with or prevent a sale and conveyance of the lands to a purchaser without reference to Mrs. Hutchins or the person making an advance, or oblige a purchaser to see to the application of the purchase money in payment of it, but that the purchase money when paid to Lye should stand in the place of the lands and should be charged in his hands, to the extent of Rankin's interest, with payment of the amount of the advance.

So that for three months from the 8th of May, 1891, there was but a lien or charge on Rankin's interest in the lands, and after that a lien or charge subject to be turned into a claim against Lye for payment in the event of a sale being made and purchase money being received represent-

Judgment.

Moss,  
J.A.

ing Rankin's interest in the lands. But there was nothing in the instrument nor in that signed by Lye hereafter mentioned to prevent Rankin and Lye from terminating the arrangement for a sale of the premises as provided, and entering into any other arrangement, but no new arrangement between them could affect the lien or charge created on Rankin's interest.

Some time after the 13th of May and before the 20th of October, 1891, the instrument of the 13th of May was brought to Lye's notice, and he was requested to himself make the advance. This he declined to do, but he signed the undated instrument, in which the plaintiff's name for the first time appears, and on the strength of which the plaintiff on the 20th of October, 1891, arranged with Mrs. Hutchins for the release to her of the security he then held for an indebtedness of \$566 and advanced her an additional sum of \$459, making altogether an indebtedness of \$1,025, the amount of his present claim.

Between this latter date and the 1st of November, 1892, the Windsor lands comprised in the Gooderham mortgage were sold and some \$19,500, the proceeds of the sale, applied in reduction of the Gooderham mortgage, and during the same period Lye became the purchaser and assignee of the Gooderham mortgage and the Boswell claim, and also advanced money to Rankin. But these transactions had no other effect than to convert Lye into a legal mortgagee of the premises, leaving Rankin still the owner of the equity of redemption and entitled to a share of the proceeds of any sale left after payment of the remainder of the prior charges.

The amount of the plaintiff's claim still stood charged against Rankin's interest in the lands in the township of Rankin, no sale of them having been effected.

Then did the transaction of the 1st November, 1892, convert the charge into one against purchase money in Lye's hands, as provided by the agreement of the 8th of May, 1891? Or did it in any way convert what was up to that date only a liability to pay out of purchase money

come to his hands, into an immediate personal liability to pay at all events ?

Judgment.

Moss,  
J.A.

The deed of conveyance from Rankin to Lye, if alone looked at, would shew a sale by the former and a purchase by the latter of the lands in fee for the price or sum of \$45,000. But the contemporaneous and other instruments and the evidence shew that this was not what the parties were doing or intending. In reality and substance Rankin was releasing or conveying his interest in the lands to Lye in consideration of a release from further liability in respect of the Gooderham mortgage and the Boswell claim, an acquittance from the advances made to him by Lye, an indemnity against any liability to Mrs. Hutchins under the instrument of the 13th of May, 1891, the sum of \$250 paid to Read & Read, and an annuity of \$1,200. Lye was acquiring all Rankin's interest in the lands, but not freed from the charges existing against that interest. On the contrary, he was assuming these, and, as between him and Rankin, undertaking to provide for them. This, however, created no privity between Lye and the owner of the charge so as to render the former liable to be sued by the latter.

Whether Lye is regarded as a legal mortgagee taking from his mortgagor a release of the equity of redemption, or as a purchaser of the mortgagor's interest in the lands, no direct liability to the owner or holder of a charge upon the lands arises in the absence of some contract with, or trust created in favour of, the chargee, and in my opinion there is neither the one nor the other in this case.

It never was contemplated that as the result of this transaction there should be in Lye's hands cash representing the purchase money of the lands. Nor does it appear to have been contemplated that Lye was forthwith or at any time, save for the purpose of indemnifying Rankin against a personal liability (if any there should be), to pay to the person who had advanced to Mrs. Hutchins on the instrument of the 13th of May, 1891. In fact, if Lye's statement of what passed between him and Rankin as to this is to be accepted, he understood from Rankin that no

**Judgment.** advance had been made and he inserted the words "if  
**Moss,** any " in the paragraph of the contemporaneous instrument  
**J.A.** of November 1, 1892, referring to Mrs. Hutchins, because  
of his supposition that no advance had been in fact made.  
In short, he took Rankin's position as regards the land.  
His action in no way deprived the plaintiff of the lien  
upon the lands, which, by the instrument of the 13th of  
May, 1891, followed by his advance, had been created in  
his favour. Nor was the plaintiff thereby deprived of the  
right which up to that date he possessed of enforcing that  
lien by the ordinary process of the law. The order for  
judgment issued from the Divisional Court, as well as the  
judgment pronounced by the Chancellor, accords the plain-  
tiff that right and gives him all the remedies of a lien-  
holder against the lands. He thus appears to be placed  
by the Divisional Court in a better position than he  
would have occupied if a sale had been made to a  
third person, for then he would have had no recourse  
to the lands, but would have been confined to his remedy  
against Lye in respect of the purchase money. The  
lands are now vested in Lye, subject to the same lien  
or charge in favour of the plaintiff that existed before the  
conveyance of the 1st of November, 1892, and there is no  
more difficulty in now enforcing that lien than there was  
before. I am not able to accept the view that by reason  
of the dealings between Rankin and Lye the plaintiff's  
position has been improved to the extent of giving him an  
additional remedy against Lye.

I agree with Street, J., that the transaction was not a  
sale of the kind contemplated by the parties and provided  
for in the instrument of the 13th of May, 1891, and the  
subsequent paper signed by Lye with reference to it.

I think, with great respect, that the judgment proposed  
by Street, J., in the Divisional Court should be substituted  
for that pronounced by the majority of the Court, but as  
the appeal fails in a substantial measure there should be  
no costs of it against the respondents.

BURTON, C.J.O., and OSLER, J.A., concurred.

MACLENNAN, J.A. :—

Judgment.

MACLENNAN,  
J.A.

Three points were insisted upon before us : first, that for want of notice either by registration or otherwise to the appellant before his purchase from Rankin and the registration of his conveyance, the plaintiff's claim was lost; second, that if the claim was good, it was good only as a lien upon the land, and not a personal liability against him; and finally that in any case it could only be good to the extent of the money advance made by the plaintiff to Mrs. Hutchins on the 20th of October, 1891. The plaintiff's documents consist of the instrument of charge of the 13th of May, 1891, the papers signed by the appellant on or about the 10th of October, 1891, but not dated, the papers signed by the plaintiff and Mrs. Hutchins on the 20th of October, acknowledging the advance of \$1,025 by the plaintiff to her, and an assignment of her interest in the agreement of charge by Mrs. Hutchins to the plaintiff to secure the advance. All these papers were attached to each other with an affidavit, sworn on the 24th of October, endorsed upon one of them, proving the execution of the paper signed by Rankin and that only. All these papers so connected were deposited in the registry office in the usual way on the 26th of October and copied into the books, and numbered as one document, 33. It is objected that none of these papers is duly registered but the instrument of charge, because that document alone was proved in the manner prescribed by the Act. I am, however, of the same opinion as the learned Judges below that the defect in the registration is cured by section 80 of the Registry Act, and that the registration of all the papers constituted notice thereof to the appellant. It was argued that *defect in proof*, the language used in the statute was not the same as total absence of proof. I do not think so. I think defect in proof must here mean the same thing as defect of proof or want of proof. If the defect is total why is that not also a case of defect in proof? The proof required by the statute is defined. If any part



**Judgment.** be wanting, there is no proof, and a defect in proof is therefore the same as no proof. The proof required by the statute is precautionary, merely, and to prevent false documents from being brought in for registration; but when an honest deed is recorded it answers all purposes of registration, whether it has been proved as required by the Act or not. The Legislature intended to prevent the hardship of a man losing his estate owing to some accidental omission to comply with the Act in the matter of proof, merely for the purpose of registration. The case of *Rooker v. Hoofstetter*, 26 S. C. R. 41, decided nothing to the contrary of this, nor do I think Mr. Justice Gwynne intended to express any decided opinion on the point in his judgment in that case.

**MACLENNAN,**  
**J.A.**

The next question is the personal liability of the appellant Lye, for if he had notice it is not disputed that the plaintiff is entitled to a charge on the land for some part of his claim.

On the 8th of May, 1891, Rankin was the owner of the land in question, subject to a mortgage to Gooderham thereon, and upon other lands, for \$39,000. The mortgage was overdue, and there was a decree for sale, and the day of sale was at hand. Two agreements were made on that day. The first was between Gooderham and Lye, by which Lye agreed to buy the mortgage for \$39,000, payable in one year, and to assign certain securities to ensure performance, and Gooderham agreed to stay proceedings for a year. The other agreement was between Lye and Rankin, by which Lye was to obtain a postponement of the sale of the land for three months and Rankin was, within the same period, to pay Lye \$500 for his services besides expenses. Rankin was also, within the same period, to arrange with Gooderham for the payment of the mortgage, and to release Lye from his liability to Gooderham as purchaser. But on failure of Rankin to pay the \$500 or to free Lye from his liability to Gooderham, Lye was authorized to sell or otherwise dispose of the lands or to continue the proceedings in the mortgage action, and it was

agreed that in that case, and in the event of a sale or other disposition of the land, Lye was to be paid his costs and to retain for his remuneration one-third of the net receipts over and above the mortgage money and a claim of Boswell and Cameron against the lands.

Judgment.  
MACLENNAN,  
J.A.

That was the position of affairs on the 13th of May, 1891, when Rankin gave Mrs. Hutchins the instrument of charge of that date. Rankin did not pay off or arrange for the payment of the mortgage within three months, or pay the \$500, or relieve Lye from his liability to Gooderham, although Lye had procured a postponement of the sale, and the effect of the two agreements in the result was that Lye was liable to Gooderham to pay him off, and he had a power of sale of the mortgaged lands for his indemnity, either by private contract or under the existing judgment, and by way of remuneration was entitled to one-third of the proceeds of any such "sale or other disposition" over and above the mortgage debt and expenses, and the claim of Cameron and Boswell, and Mrs. Hutchins' instrument of charge was subject to all that.

While matters remained in that position and before Mrs. Hutchins had obtained any loan on the security of her charge, she applied to the appellant for an advance thereon. This he did not grant, but on the 10th of October signed the paper now held by the plaintiff. It will be observed that in the agreement of charge, Rankin authorizes Lye as his attorney for the sale of the property to pay the charge out of his, Rankin's, "share of the proceeds of such sale or other disposition of the property," and if, after Mrs. Hutchins had obtained a loan, a sale had been made, either directly by Rankin himself or by the appellant as his attorney, or under the decree of the Court, the plaintiff, independently of the paper signed by Lye, would only have been entitled to payment out of Rankin's two-thirds share of the surplus. I think, too, the plaintiff's right would be the same, and no higher, under the paper signed by Lye, for what he agrees to do by that paper is simply to pay it out of Rankin's share, which had been agreed

**Judgment.** between them to be two-thirds. It is said that when Lye  
**MACLENNAN, J.A.** signed the paper of the 10th of October the space now  
filled up with the plaintiff's name was left blank. If so, the intention must have been that it should be filled up with the name of any person who might be willing to make an advance to Mrs. Hutchins on the security of the charge, and I think Lye is as much bound by his agreement as if the plaintiff's name had been inserted before it was signed, and the paper is an agreement with the plaintiff that if he made the advance he would pay it out of Rankin's share of the proceeds. The appellant also at the same time retained in his possession either a duplicate or a copy of the instrument of charge, which was to be returned to Mrs. Hutchins in the event of the paper signed by him being for any reason cancelled, which I take to mean in case it should not be acted upon. I think that after making that agreement it would be a fraud on the part of Lye to make, or to assist Rankin in making, any disposition of the land which would defeat the plaintiff's claim, after he had advanced his money, whether he had actual notice of the advance having been made or not. Having made the agreement for the very purpose of enabling Mrs. Hutchins to obtain an advance upon it, he was bound to inquire before disposing of the land, or the proceeds of it, whether an advance had been made upon it or not. I therefore think that independently of the registry law, or any question of registration, Lye's present position is the same as if, when he made his subsequent purchase from Rankin, he had actual notice of the plaintiff's advance to Mrs. Hutchins on the security of the charge signed by Rankin.

What next occurred was a sale of the mortgaged land other than the township of Rankin for \$19,500, which reduced the mortgage debt to about \$20,000, and afterwards, on the 13th of April, 1892, a new agreement was made between Rankin and Lye, by which further extension of time was given to the former for redemption until the 1st of October, 1892, and Lye agreed to acquire the claim of

Cameron and Boswell, which was to be added to the mortgage debt. It was also agreed that the one-third share of the proceeds which Lye was to have under the former agreement should be valued at \$10,000 and should also be added to the mortgage debt as a charge upon the land, and should bear interest. It was further agreed that Rankin might redeem the land at any time after the 1st of July, 1892, by paying all the said charges, the \$10,000 above mentioned in that case to be reduced to \$5,000, otherwise the whole amount was to be paid with interest and expenses on the 1st of October, 1892.

Judgment.

MACLENNAN,  
J.A.

Rankin, however, did not pay by either of the times named, and on the 1st of November, 1892, by deeds of that date, Lye having paid off Gooderham and also the Boswell and Cameron claim, became the purchaser of the land directly from Rankin for his own use and benefit, and the question is what the effect of that was upon the plaintiff's claim.

It is quite clear that the plaintiff was in no way bound by the agreement of the 13th of April so far as it changed Lye's share of the proceeds of sale from one-third of the surplus to the sum of \$10,000, and the question turns wholly upon the transaction of the 1st of November. That sale was carried out by an absolute conveyance by Rankin to Lye expressed to be free from encumbrances, and for the consideration of \$45,000. At the same time, however, two other instruments were executed between them. By the first of these it is declared that the consideration of \$45,000 in the deed is nominal, and that the true consideration is as thereafter stated. The first is the moneys due to and the liabilities incurred by Lye under the agreement of the 13th of April and the Boswell and Cameron claim; second, advances theretofore made by Lye to Rankin; third, an indemnity of Rankin from liability if any under the agreement of the 13th of April, 1891, with Mrs. Hutchins, registered as No. 33; fourth, the payment of \$250 to Read & Co., at the request of Rankin; and fifth, payment to Rankin of an annuity of

Judgment. \$100 per month for his natural life, and it is declared that Rankin had no right to require Lye to account for the nominal consideration expressed in the deed and that, except the annuity, the whole consideration was paid and satisfied in full. The other instrument is a charge upon part of the land of the annuity of \$100 per month, and a covenant by Lye to pay the sum monthly in advance.

MACLENNAN,  
J.A.

Now the substance of this transaction is this: The land is bargained and sold for \$45,000, and it is collaterally agreed that this consideration is to be satisfied for the most part otherwise than by the payment of actual money. Lye was at the time a legal mortgagee by assignment for a sum of about \$20,000. He had also paid off the Boswell and Cameron claim for between \$3,000 and \$4,000, and as between him and Rankin he had a further claim for \$10,000, and there was some interest and expenses. Besides that there had been money lent by Lye to Rankin, the actual amount of which is not stated. Then there was the money, if any, for which Rankin might be liable under the Hutchins' agreement of May, 1891, and the \$250 to Read & Co., and the annuity. If a sale on these terms had been made to anyone else than Lye, it is clear that all these things would be proceeds of the sale, representing a large sum over and above the balance due on the original mortgage, and the Boswell and Cameron claim, and it is out of Rankin's two-thirds share of such proceeds that the plaintiff was entitled to be paid, and I think these things were equally proceeds of the sale although it was made to Lye. Even under the agreement of the 8th of May, a sale when made must have been a sale by Rankin. Lye was merely his attorney or agent, and a sale to the agent would be a sale within that agreement. By the terms of the actual sale the \$10,000 which Lye was to have under the agreement of the 13th of April was satisfied. Lye retained it out of the purchase money and in effect received it. It is expressly referred to in the collateral instrument of the 1st of November by the words "money due under the agreement of the 13th April, 1892." I think, therefore, Lye has re-

ceived that sum within the meaning of his agreement with the plaintiff. I also think he has received the other items of consideration, the loans made, the sum necessary to indemnify Rankin, the \$250, and the annuity, on all of which, to the extent of two-thirds, the plaintiff's charge has attached, and two-thirds of which is amply sufficient for its satisfaction.

Judgment.  
MACLENNAN,  
J.A.

If there had been nothing but the \$10,000, although as between the appellant and Rankin the appellant was entitled to the whole of it, yet, as against the plaintiff, he could only claim one-third, because his right to it depended only on the agreement of the 13th of April, 1892, which does not bind the plaintiff. I am of opinion, therefore, that by virtue of his agreement with the plaintiff, Lye is personally liable to pay out of the proceeds of sale come to his hands whatever sum the plaintiff is entitled to upon the terms of the charge.

The remaining question is whether the plaintiff's claim is confined to the actual cash advanced to Mrs. Hutchins, or whether he can claim his whole debt. I am of opinion that he is entitled to his whole debt. This is not like a case of suretyship. If Mrs. Hutchins had got the money from some one else and had paid Armstrong off, the lender would have security for the full amount. I do not see why Armstrong could not do the same thing. The old debt was extinguished, the old security given up, and a new contract of loan entered into. I think all that was in accordance with the very letter as well as the substance of the documents and that this ground of appeal also fails.

The appeal should therefore, in my opinion, be dismissed.

*Appeal allowed in part, MACLENNAN, J.A., dissenting.*

R.S.C.

## PAYNE V. CAUGHELL.

*Way—Toll Road—Municipal Corporation—Power to Sell Toll Road to Individual—Tolls—16 Vict. ch. 190, sec. 26—Practice—Appeal—Divisional Court.*

Under section 26 of 16 Vict. ch. 190, a municipal corporation to which, under 12 Vict. ch. 5, sec. 12, a toll road has been transferred by the Governor-in-Council, has power to sell the road to an individual, who may exact tolls for the use thereof. The right to purchase is not limited to toll road companies.

Judgment of a Divisional Court, 28 O. R. 157, reversed.

Where, pursuant to 12 Vict. ch. 5, sec. 12, the Governor-in-Council has transferred to a municipal corporation a toll road upon which certain rates of toll are in force, with the right to alter or vary the rates of toll, it can increase the rates of toll to any sum not exceeding the maximum mentioned in Schedule A. to 12 Vict. ch. 4, and a subsequent transferee of the municipal corporation can exact payment of the increased rates and is not limited to a toll sufficient to keep the road in repair.

Where the Judge presiding at the trial of an action directs it to stand over to have parties added, and both parties apply to a Divisional Court to set aside this direction and, by consent and without prejudice to the right of appeal, ask the Divisional Court to hear the case on the merits, either party may, without leave, appeal to the Court of Appeal for Ontario from the judgment of the Divisional Court.

**Statement.** THIS was an appeal by the defendant from the judgment of a Divisional Court, reported 28 O. R. 157, where the facts are stated, and was argued before BURTON, C. J. O., OSLER, MACLENNAN, and MOSS, J.J.A., on the 18th and 19th of May, 1897.

The respondent contended, upon the grounds mentioned in the judgment of MOSS, J. A., that no appeal lay, and moved to quash the appeal.

The appellants opposed this motion, and moved in the alternative for leave to appeal. The appeal was argued on the merits subject to the objection, and the line of argument is sufficiently indicated in the report below.

*Robinson, Q. C., and E. Meek, for the appellants.*

*J. A. McLean, and W. K. Cameron, for the respondent.*

October 20th, 1897. MACLENNAN, J. A. :—

This appeal concerns an interest on land, and it will assist in determining the questions involved to consider what the nature of that interest is. The road in question

was originally a public highway, laid out by the Quarter Sessions in pursuance of 50 Geo. III. ch. 1, and by section 35 the soil and freehold became vested in the Crown. By the Act 9 Vict. ch. 37, sec. 23, it was vested in the Crown as one of the public works of the Province, and by section 12 the Governor-in-Council was authorized to impose tolls thereon not exceeding the sums specified in a schedule. In pursuance of the authority of the statute toll houses and gates were erected, and the road became a government toll road.

Judgment.

MAULENNAN,  
J.A.

By the Act 12 Vict. ch. 5, sec. 12, the Governor-in-Council was empowered to grant and transfer and convey, either for ever or for a term of years, any such road to any municipal corporation, or to any company, upon such terms as might be agreed upon; and also to transfer the powers in respect thereof which were possessed by the Crown.

In exercise of this power, the Governor by order in council of the 13th of May, 1851, granted and conveyed to the corporation of the county of Middlesex, in consideration of £4,500, this road, and the continuation of it to Lake Erie, together with all bridges, toll gates, toll houses, and the tolls arising therefrom forever, subject to the duty to keep it in repair, and to maintain it as a public highway, and with power to ascertain, fix, and vary the tolls to be taken therefor. Now, although in general the soil and freehold of highways in this country is vested in the Crown, that is not necessarily so in all cases. In England the soil and freehold is in general vested in the adjacent landowner; so also in this country there is nothing to prevent a landowner from dedicating a highway to the public, reserving the soil and freehold in himself. In like manner, also, he might dedicate a highway subject to the payment of tolls: *Lord Pelham v. Pickersgill*, 1 T. R. 660, 667; *Rex v. Nicholson*, 12 East, at p. 340; Woolrych's Law of Ways, pp. 180, 181; and see *Fisher v. Prowse*, 2 B. & S. 770.

When, therefore, the order in council of May, 1851, was passed, the effect of that, having regard to the Act which



**Judgment.** authorized it, was to vest in the corporation of Middlesex  
**MACLENNAN,** the soil and freehold of the road, and the toll-houses and  
**J.A.** gates thereon, and the right to exact tolls from the public  
for travelling thereon. The corporation became absolute  
owners of the land in fee simple, subject to a public ease-  
ment, on payment of tolls, which the corporation had the  
power to fix from time to time up to a certain maximum  
limit. Besides the power which the Crown had under 12  
Vict. ch. 5 to convey this road to a municipal corpora-  
tion, it had also the power to convey it to a company. Of  
course, that did not mean any company, but only to a  
company which, by its charter or Act of incorporation, was  
authorized to acquire such property ; or in other words, to  
an incorporated road company. But by a subsequent Act,  
13 & 14 Vict. ch. 14, sec. 5, a distinction was made in case  
of a sale to a company, and in such a case the Crown could  
resume the property after ten years at least, and a lease  
to a company could not be made for a longer period than  
ten years. There was no such limitation in case of a  
transfer to a municipal corporation : that might be either in  
perpetuity or for any term of years. There appears not  
to have been any express power given to municipal corpora-  
tions to sell toll roads which they might have constructed  
or purchased until 1853, when such power was given by  
section 26 of 16 Vict. ch. 190. That Act is entitled "An  
Act to amend and consolidate the several Acts for the  
formation of joint stock companies for the construction  
of roads and other works in Upper Canada." By section  
25, it authorizes road companies to sell their stock, or any  
part of their road, to any neighbouring municipality, and  
authorizes such a municipality to buy, and to exercise in  
respect of the road all the powers and authority which  
the company possessed, and, by section 26, it was enacted  
that any municipality might sell any toll road which it  
might have constructed or purchased, or any stock held in  
any road or other company, applying the proceeds to pay  
debts contracted therefor, or for the general purposes of  
the municipality. The plaintiff contends, and the judg-

ment now appealed from decides, that this section does not authorize a sale to a private person ; and that it is only a sale to a company which was meant. I am, with great respect, unable to agree to that construction of the section. The power to sell is unqualified, and there is no express restriction as to who may buy. It is argued that because the Act is one for the formation of road companies the intention must have been that only such companies could buy under the authority of the section. It would seem to be a sufficient answer to that argument that the Act is to enable companies to be formed, not for the purpose of buying roads already in existence, but for the construction of new roads. Indeed, I do not find in the Act any authority whatever enabling a company incorporated under its clauses to buy an existing road either from a municipality or from another company.

In my opinion, therefore, section 26, while it enables a municipality to sell a toll road which it may have constructed or purchased, in no way, either expressly or by implication, disqualifies or disables individuals from becoming purchasers, and unless there is something in the nature of the property which makes it impossible for a private person to become a purchaser, I see no reason why the municipality could not lawfully sell this road to Hepburn, or why Hepburn could not lawfully buy it. I have already pointed out what I think is the nature of the property. It is freehold land subject to a perpetual easement in favour of the public on the terms of payment of toll. There is no difficulty in the way of a private person acquiring or holding such an interest as that, or of his enforcing the payment of toll as a condition of any person passing the gates erected for that purpose. Therefore, if the transaction with Hepburn had been an actual conveyance of the road in fee simple as a toll road, I am of opinion that such a conveyance would have been valid and effectual, and that he would thereby have become the owner thereof in fee simple, subject to the public ease-

Judgment.  
MACLENNAN,  
J.A.

Judgment. ment, and with the right to collect the tolls which the  
MACLENNAN, municipality had a right to exact at the time of the sale.  
J.A.

It is objected, however, that although a sale might have been made a lease for a long term such as was granted to Hepburn, was not authorized. I think that objection untenable. Although carried out by a demise for 199 years, the transaction was in reality a sale. The road was sold to Hepburn for £4,000, payable in twenty instalments with interest, and, it being considered doubtful whether an individual could lawfully buy, the transaction was carried out by a demise for 199 years, reserving the instalments of purchase money and interest as rent for nineteen years, and a nominal rent thereafter, but with a covenant by the municipal corporation to convey, in case they could legally do so, in fee simple at any time upon payment being made of the instalments of purchase money or good security being given therefor. Hepburn was let into possession and paid his purchase money, and he was, therefore, according to the true effect of the deed, from the beginning a purchaser in possession, and that is the defendants' position to-day, claiming under Hepburn. There is also another answer to this objection. The county had a clear right to lease the tolls, whether they could lease the road or not. This lease does demise the tolls, and being for valuable consideration, it must be good, even though the demise of the road itself should be of questionable validity.

A further objection is, that the toll demanded from the plaintiff by the defendants was excessive. In the first place it was said that no toll could be collected beyond what was necessary to keep the road in repair. There is no clear enactment to that effect, and it would be strange if there were. While the road is in the possession of a municipality, it might be reasonable that no greater toll should be exacted than would indemnify the municipality for necessary repairs, but the municipality was expressly authorized to sell for a valuable consideration, and it would be absurd to expect any one to buy a road for a large price with such a restriction.

In the present case the sale was for a large sum, and it would require very clear demonstration to deprive the purchaser of any return whatever for his investment.

Judgment.  
MACLENNAN,  
J. A.

Again, it is said that in May, 1849, the toll to be taken on the road was reduced to twopence, and that the toll of fourpence or seven cents now exacted is illegal. This increased rate was fixed by the municipality while the road was in their possession on the 27th of February, 1856, and the question is, whether the municipality had power to do so. The learned Chancellor has decided that it had not, but with great respect, I am unable to agree in that conclusion. By 8 Vict. ch. 30, sec. 1, the Governor-in-Council was authorized to establish the tolls to be taken upon such roads, and from time to time to repeal, alter and amend the same. That Act, however, was to be in force only for one year, and from thence to the end of the next Session of Parliament. By 9 Vict. ch. 37, sec. 12, the Governor-in-Council was authorized to impose tolls, and from time to time to alter and vary them, but so as not to exceed the rates specified in Schedule B. 4, which fixed the maximum toll for this road at sixpence. By 10 & 11 Vict. ch. 24, sec. 7, the Governor-in-Council was authorized to change the toll gates on every road, and to alter the rates, but so as not to increase the toll at each gate beyond the maximum in Schedule B. 4 of 9 Vict. ch. 37. By 12 Vict. ch. 4, secs. 1 and 2, a new Schedule—A.—was substituted for Schedule B. 4 but the power to alter or vary the rates from time to time so as not to exceed the schedule rate was continued.

It was after this Act was passed, that the toll was reduced to twopence, as already mentioned. Now the Act, 12 Vict. ch. 5, which authorized the government to transfer the road to the municipality, also, by section 13, authorized it to transfer any or all of the powers and rights vested in the Crown or in the Governor-in-Council, or in any officer or department of the government with regard to the road; and the order in council of May, 1851, by clause six, expressly transferred the power to alter or vary the tolls to the municipality.

Judgment.

MACLENNAN,  
J.A.

When, therefore, the municipality, on the 27th of February, 1856, passed a by-law fixing the toll to be taken upon this road at fourpence, I think it had clear statutory authority to do so, and that the right of the public to use the road has ever since been subject to the payment of the increased toll thereby fixed.

It was made a question whether the plaintiff could maintain this action, and whether it was only the Attorney-General alone who could do so. It is not necessary to determine that question however, and if it were, it might be a serious difficulty in the plaintiff's way, having regard to the rule established by *Winterbottom v. Lord Derby*, L. R. 2 Exch. 316.

I do not think there is anything in the objection that the case is not appealable to this Court.

The appeal should, therefore, be allowed, and the action should be dismissed.

Moss, J. A. :—

The plaintiff suing as one of Her Majesty's subjects entitled to travel upon or along a certain highway in the county of Elgin, known as the London and Port Stanley Gravel Road, complains that in driving along the said highway with his horse and vehicle, he was wrongfully and illegally obstructed by the defendants by means of a toll bar erected or placed across the highway, and that on the 12th of October, 1895, in order to gain permission to pass the bar and travel along the highway, he was compelled to pay the sum of seven cents to the defendants by whom it was demanded from him.

He disputes the right of the defendants to demand or exact tolls on the said highway, or to obstruct it by means of toll bars. He claims an order directing the removal by the defendants of the toll bars, an injunction restraining the defendants from demanding or exacting tolls for the use of the highway, damages for the wrong done him, and a return of the seven cents.

The judgment now in review, dated the 17th of November, 1896, declares that the defendants had not on the 12th of October, 1895, power or authority to demand or exact tolls for the privilege of passing or repassing on or along the public highway in question, from the plaintiff or other of Her Majesty's subjects, orders the defendants to remove from the highway the toll bars and other obstructions thereon erected by them, enjoins them from hereafter asking, demanding, or receiving tolls from any of Her Majesty's subjects for the privilege of passing or repassing along said highway, and from hereafter obstructing the same by toll bars or other erections or obstructions, and orders the defendants to pay to the plaintiff the sum of seven cents and the costs of the action.

Judgment.

Moss,  
J. A.

The judgment was pronounced by a Divisional Court under the circumstances appearing in the report: 28 O. R. 157.

Upon the opening of the appeal, the plaintiff's counsel objected that no appeal lay to this Court, or at all events without leave, and moved to quash the proceedings. The defendants resisted the motion, and also moved for leave to appeal if necessary. The appeal was argued subject to the motions, and I may now say that for reasons to be stated later on, I think the defendants should not be precluded from appealing to this Court.

The defendants rest their defence upon their proprietorship of the road as a toll road, and their consequent title to impose and demand payment of tolls from persons travelling upon or along or using the highway with vehicles, horses and other animals.

Their title is derived from one Robert Hepburn, whose title is shewn to be under an instrument, dated the 16th of February, 1857, made between the municipal council of the county of Elgin of the first part, and Hepburn of the other part.

The road in question was, until the 13th of May, 1851, one of the public roads forming part of the local works

**Judgment.**

**Moss,  
J.A.**

belonging to the Province of Canada, mentioned and described in the Act 12 Vict. ch. 5.

On that day, by an order in council, under the authority of the Acts 12 Vict. ch. 5 and 13 & 14 Vict. ch. 14, the Governor-in-Council granted and conveyed a certain described portion of the public toll road known as the London and Port Stanley Gravel Road, together with the bridges, toll gates, toll bars, and toll houses thereon, to the municipal council of the county of Middlesex, and their successors, to hold to them and their successors for ever, upon and subject to certain specified terms, provisions, and conditions.

By virtue of this grant, the road was held by the municipal council of the county of Middlesex until the year 1852, when the county of Elgin was formed out of part, and separated from the remainder, of the county of Middlesex. Upon the separation, the part of the London and Port Stanley gravel road now in question, was allotted and transferred to the county of Elgin, and it is not questioned that Elgin obtained and held the same rights, title, powers, and authorities, as were vested in Middlesex by virtue of the order in council of the 13th of May, 1851.

In the year 1857 the municipal council of Elgin being minded to dispose of the road, entered into an agreement with Robert Hepburn for the sale and transfer of it to him for the sum of £4,000, payable in twenty years with interest, but, when on the point of concluding the arrangements, they were advised that they could not sell to a private person, and that there was no authority for the formation of a company to purchase the road in question. In view of this advice, the council was recommended to give effect to the agreement by means of a demise of the road, bridges, culverts, toll houses, toll bars, weighing scales, tolls, rights, powers, privileges, and appurtenances, for a term of 199 years, the annual rent, for the first twenty years to be a sum equal to an annual instalment of one-twentieth of £4,000, and interest thereon, thus making up

the amount of the purchase money and interest, and for the residue of the term, to be five shillings per annum.

This recommendation was acted upon, and the instrument of the 16th of February, 1857, between the municipal council of the one part and Robert Hepburn of the other part, was executed. Among other provisions contained in this instrument is a covenant by the municipal council that in case they shall be enabled legally to sell and convey the road to Hepburn and his assigns, or to any company formed by him for that purpose, they will convey and assure all their right, title, and interest in the road to Hepburn, on his paying or securing the payment of the balance of the sum named as the rental for the succeeding nineteen years.

It is admitted that the defendants occupy the position of, and are entitled to all the rights belonging to or held by, Hepburn under this instrument. It appears that ever since its date Hepburn, and those claiming under him, have been in possession of the road and property embraced in it, and have been collecting tolls from persons travelling upon or using it. The defendants claim to be entitled to demand seven cents for every vehicle drawn by one horse passing a toll bar or gate on the road, under and by virtue of a by-law passed by the council of the county of Elgin on the 21st of February, 1856, whereby the rate of toll to be taken for every vehicle drawn by one horse or animal, was fixed at fourpence.

The plaintiff impeaches the defendants' title to impose or demand tolls, and insists that the municipal council of Elgin had no power or authority to sell or lease the road to Hepburn, and that, if they had, no by-law of the council authorizing the transaction is shewn. He also insists that in any event the sum of seven cents demanded for toll was excessive and beyond what was sanctioned by law, because it exceeded the amount fixed by the Governor-in-Council prior to the by-law of February 27th, 1856, and because the tolls collected are largely in excess of the amount required to maintain the road.

Judgment.

Moss,  
J.A.



**Judgment.**

**Moss,  
J.A.**

The Divisional Court has given full effect to these contentions, as appears from the opinions of the learned Judges, as well as from the judgment issued pursuant thereto.

Among the many objections to the judgment urged before this Court on behalf of the defendants, it was contended that, granting that the municipal council had no power to sell or lease to Hepburn, he and the defendants might be considered as the agents of the council for the collection of tolls, and if the amount demanded was proper it was not open to the plaintiff to object to pay; and further, that the plaintiff was not entitled to maintain an action for an injunction against obstruction of the highway, for the alleged obstruction, if a nuisance at all, was a public nuisance, and the plaintiff suffered no special damage.

These contentions do not appear to have been dealt with by the Divisional Court, and probably it only becomes material to now consider them if the conclusions of the Divisional Court are affirmed.

The main question for determination is, whether on the 16th of February, 1857, the county of Elgin was authorized to sell, and Robert Hepburn was competent to purchase, the road in question. It does not appear material to consider whether the power to lease for a term of years existed, for if the municipal council had the power to sell, the agreement to convey the road contained in the instrument of the 16th of February, 1857, followed by continuous possession under it, are under the Judicature Acts, sufficient to support as against the plaintiff an averment of proprietary title.

At the date of the instrument, counties might acquire title to toll roads in at least four ways. By the Municipal Act of 1849 (12 Vict. ch. 81, sec. 41, sub-secs. 11 and 22), they were enabled to construct macadamized or plank roads and impose tolls for the purpose of defraying the expense.

By 12 Vict. ch. 5, secs. 12 and 13, as extended by 14 & 15 Vict. ch. 57, they were empowered to acquire from the Government of the Province, certain local works, inclu-

ding toll roads, upon terms of payment to be agreed upon, and by 14 & 15 Vict. ch. 124, they were authorized to create a debt and give a security to the Crown for the price of any local work purchased under 12 Vict. ch. 5.

Judgment.

Moss,  
J.A.

By the 25th section of 16 Vict. ch. 190, passed in the year 1853, for the purpose of amending and consolidating the several Acts for the formation of joint stock companies for the construction of roads and other works in Upper Canada, they were empowered to purchase the stock of a company formed for the purpose of constructing a toll road passing through or along the boundary of the municipality, and thereby acquire the road and hold it thereafter for the benefit of the locality, and stand in the place of the company.

By the same section, they were authorized and empowered to purchase from a company any part of its road and thereafter hold it for the use and benefit of the locality, and stand in the place of the company, and have all its powers in respect to such part.

In addition to these extensive powers of acquisition, there was conferred by section 26 of 16 Vict. ch. 190, a power of sale, which in terms appears to apply to any toll road held by a municipality in whatever way acquired. The provision is: "It shall and may be lawful for any municipality to sell any work or macadamized, plank, or other toll road which they may have constructed or purchased, or any stock held in any road or other company, applying the proceeds of such sale to the payment of existing debts contracted for the construction of the same, or for such stock," etc.

The 59th section extends the operation of the 26th section (amongst others) to a turnpike road constructed by or belonging to a county authorized to acquire or construct roads under any Act of the Parliament of Canada.

The language of section 26 in its natural and ordinary meaning would include a power to sell to an individual.

Separated from its surroundings, it undoubtedly confers upon municipalities the widest possible power to sell their toll roads.

Judgment.

Moss,  
J.A.

There seems no question as to the power of the municipality to sell—that is ample—but the question is as to the power to become a purchaser or purchasers from it.

There is no express restriction upon selling to any purchaser who may offer. Is there anything in the context to control the generality of the language, or to prevent its being read in its natural and ordinary sense, giving the words employed a meaning to their full extent and capacity? Or is there anything in the Act inconsistent with the notion of a municipality selling to an individual?

It is to be observed that while the same Act confers upon companies to which it is applicable, the power of selling their roads under certain circumstances, it nowhere expressly authorizes or empowers companies formed for the purpose of constructing roads to purchase roads or other works from municipalities or from other companies or from individuals, or to increase their capital stock, or to take other proceedings, or make other arrangements for binding their shareholders to such an enterprise.

The general law applicable to corporations disables a company formed for the purpose of constructing and operating a toll road from becoming the purchaser of another or additional road. *Ernest v. Nicholls*, 6 H. L. C. 401, was a case of an agreement for the sale by one company, not authorized by its charter to sell, of its whole concern to another company which had power to purchase the business of any other company carrying on a like business.

The decision went upon the invalidating effect of one person being a director of both companies, and so “personally interested” within the meaning of 7 & 8 Vict. ch. 110. But in giving judgment, Lord Cranworth said (p. 413): “The transaction in question was a purchase by the one company of the goodwill and the whole concern of the other. That would, ordinarily speaking, be a transaction in which no company would be justified in engaging, because it cannot be said to be within the ordinary scope of one company to purchase the goodwill of another.”

Lord Wensleydale said (p. 421) the question was, "as to a special contract to do the very unusual thing of purchasing by one company the trade of another. Such a contract clearly does not bind, unless it is authorized by the deed (of incorporation), and it is made strictly according to its provisions." See also Brice on *Ultra Vires*, 2nd ed., p. 161.

Judgment.

Moss,  
J.A.

If the generality of the words of section 26 is to be restricted to some class of purchasers, by what process is that class to be ascertained? There seems to be as much, if not more, difficulty in holding that the words of section 26 authorize companies to purchase, as there is in holding that they do not permit individuals to become purchasers. So far as the purchase of shares authorized to be sold by municipalities under this section is concerned, the only difficulty appears to be in seeing that authority is given to companies. For the acquisition by one company of the shares of another company is not authorized even by express power to purchase the latter's business or undertaking: *In re European Society Arbitration Acts*, 8 Ch. D. 679, 705.

On the other hand the right of an individual to purchase such shares does not appear open to question.

If it was intended that companies only should be entitled to purchase from municipalities, it seems singular that it was not clearly expressed, and all doubt as to the capacity of the companies set at rest by express enactment. But this section has remained unchanged in substance from its first enactment.

And while there has been no legislation expressly authorizing companies to become purchasers of toll roads from other companies or municipalities, there has been legislation recognizing the fact of purchases of such roads by individuals under certain circumstances.

In 1859 was passed the Act 22 Vict. ch. 43, to remove doubts in regard to the rights of purchasers of roads constructed by joint stock companies. The terms "purchaser or purchasers," are used without any apparent restriction

Judgment.

Moss,  
J.A.

upon their ordinary meaning, which would include "individuals."

In 1868 the Act 31 Vict. ch. 31, secs. 13 and 14 (O.), made clear that a toll road constructed by a joint stock company might be sold under execution upon any judgment against the company, but the statute makes use of no language indicating an intention to restrict the class of purchasers.

And in one instance at least—that of the Hamilton and Port Dover Toll Road—individuals, in the year 1865, became purchasers from the Province, under 12 Vict. ch. 5, of that road.\*

The Legislature has never expressly indicated an intention to prevent individuals from becoming purchasers at such sales, neither has it ever expressly declared road companies formed for the construction of toll roads competent to purchase other roads from other companies. Ought it to be concluded that the Legislature intended to exclude the former and to give to the latter the sole right? There does not appear to be any greater objection to an individual purchasing a toll road owned by a municipality than there is to his purchasing one owned by a company, and if there is nothing to prevent him from purchasing in the latter case there ought not to be anything in the other.

The power of the municipality to sell is apparently unlimited. And in face of section 26 I am unable to conclude that an individual might not under it purchase from a municipality any toll road the latter was empowered to sell.

Then if the county might lawfully sell to an individual it could legally contract to sell, and the instrument in question here, especially when coupled as it is with possession conformable to it for a period of nearly forty years, may well be upheld as against the plaintiff as a sufficient grant and conveyance of the road and its appurtenances.

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\*See Sessional Papers, 1867-68, vol. 1, No. 5. Sessional Paper (No. 8), p. 312.

Hepburn or his assigns might call for a conveyance of the entire interest of the county of Elgin not transferred by the instrument of the 16th of February, 1857, and this equitable right confers a title as against the plaintiff.

Judgment.

Moss,  
J.A.

It was urged on behalf of the plaintiff that at all events the instrument of the 16th of February, 1857, could only be sanctioned or directed by by-law of the corporation and that the existence of one has not been shewn. The instrument has affixed to it the seal of the corporation, and purports to be signed by the Warden and countersigned by the Clerk of the county, so that it appears to have been executed as required by section 198 of the Municipal Act of 1849 (12 Vict. ch. 81).

The provision as to the exercise of the powers of a municipal council by by-law when not otherwise authorized or provided for, was first enacted in 22 Vict. ch. 99, sec. 186, after the date of this instrument.

At its date the provision of the Municipal Act with regard to counties was that their corporate powers should be exercised by, through, and in the name of the municipal council: 12 Vict. ch. 81, sec. 32.

The minutes of the proceedings of the council on the 27th and 28th of January and the 16th of June, 1857, shew that the matter of selling or leasing the road to Hepburn and the indenture for effecting it were before the council, and among the records is a report of the special committee appointed to dispose of the road referring to their dealings with Hepburn. The minutes of the 16th of December, 1857, shew that the council recognized the transaction with Hepburn as completed.

We may apply as against the plaintiff the language of Denman, C.J., in *Hill v. Manchester and Salford Water Works Co.*, 5 B. & Ad. at p. 874: "The plaintiff proved that the common seal of the corporation was affixed to the bond by the officer who had the legal custody of it, and so threw upon the defendants the burden of clearly proving that it was not set by their authority."

Hepburn, or those claiming under him, could not, while

Judgment. in possession, deny the validity of the instrument or refuse  
Moss, to perform his covenants : *Frontenac v. Chestnut*, 9 U. C. R.  
J.A. 365. See also the observations of Gwynne, J., in *Kingston*  
*and Bath Road Co. v. Campbell*, 20 S. C. R., at p. 618.

And it is not being attacked on behalf of the corporation.

Then comes the question, was the toll claimed and exacted from the plaintiff excessive, and therefore unlawful? For if so, the plaintiff might be entitled to recover back his seven cents.

The Act 8 Vict. ch. 30, declares it lawful for the Governor-in-Council by proclamation to be issued at any time either before or after the 1st day of May, 1845, to appoint and establish the tolls to be paid after that day upon, amongst other public works, the road in question.

By order in council, dated the 28th of April, 1845, the toll to be paid upon this road for a four wheel private carriage drawn by one horse, was fixed at fivepence.

Then followed 9 Vict. ch. 37 (sec. 12), 10 & 11 Vict. ch. 24, and 12 Vict. ch. 4, dealing with the subject of tolls and toll gates. The effect of their provisions is, that the Governor-in-Council is empowered to change the location of toll gates and to continue to fix the tolls, but the maximum toll to be fixed in respect of any vehicle drawn by one horse, was not to exceed sixpence : see schedule to 12 Vict. ch. 4, statutes 1848-49, p. 106. But the fivepence toll fixed by the order in council of the 28th of April, 1845, was not altered until the 11th of May, 1849, when by order in council issued in accordance with the provisions of 12 Vict. ch. 4, the rate of toll for every vehicle drawn by one horse, with load not exceeding ten hundred weight, was fixed at twopence. The right of fixing or varying tolls, vested in the Governor-in-Council, remained as conferred by 8 Vict. ch. 30, and 9 Vict. ch. 37, sec. 12.

Section 13 of 12 Vict. ch. 5, authorized the granting to and vesting in the purchaser of a public work sold and granted under the provisions of section 12, of any or all of the powers and rights vested in the Crown or in the

Governor-in-Council, or in any officer or department of the Provincial Government, with regard to the public works ; and declared that the order in council granting or conveying such public work, might contain such conditions, clauses, restrictions, and limitations, as might be agreed upon, which, as well as the provisions of the order in council, should, in so far as it was not inconsistent with the Act, or should not purport to grant any right or power, not immediately before the making of the order in council vested in the Crown or the Governor-in-Council or some officer or department of the Provincial Government, have full force and be obeyed as if contained in the Act and made part of it.

Judgment.

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Moss,  
J.A.

The order in council of the 13th of May, 1851, vested in the municipal council of Middlesex all the rights and powers then vested in the Governor-in-Council, which under 12 Vict. ch. 5, could be granted to the council, of enacting regulations for fixing or varying the tolls. It also provided that all existing regulations should continue in force until otherwise enacted by any by-law of the municipal council, and that all rights and powers vested in Her Majesty or her servants with regard to the works granted, should be and were thereby granted and vested in the municipal council and their assigns and their servants respectively.

The tolls to be collected were restricted to those mentioned in the schedule to 12 Vict. ch. 4, and were not to exceed the maximum amount fixed in that schedule.

Thus there were vested in the municipal council (1) the rates of toll as established and in force on the 13th of May, 1851 ; (2) the power to fix and regulate them for the future, not, however, exceeding the maximum rate of sixpence fixed in the schedule to 12 Vict. ch. 4 ; (3) the power to fix and regulate by by-law ; (4) the powers of enforcing payment and collection of tolls possessed by Her Majesty, the Governor-in-Council, and their servants.

With the toll fixed at twopence, and the power to vary it to any rate not exceeding sixpence, the municipal council of the county of Elgin, on the 27th of February, 1856,



**Judgment.** passed a by-law fixing the rate at fourpence. It was suggested that the 28th and 29th sections of 16 Vict. ch. 190, applied, and that the rate imposed was in excess of what was warranted by these sections. But they appear to apply only to roads owned or held by companies. At all events, it was not intended by section 29 to limit the maximum of tolls in all cases. It is a re-enactment of the provisions of section 3 of 14 & 15 Vict. ch. 122, and the intention and effect of that section are explained in *Little v. Dundas, etc., Road Co.*, 2 C. P. 399.

**Moss,  
J.A.**

The order in council of May 13th, 1851, does not prescribe or require publication of a by-law varying or fixing tolls to be made in the Gazette. It was probably considered sufficient that it should be given publicity in the same manner as any other by-law of the council.

The plaintiff's objections to the defendants' title to the road and right to impose and exact the toll demanded from him fail, and his action should be dismissed.

This conclusion renders it unnecessary to consider the objections raised to the plaintiff's right to maintain the action, but it seems more than doubtful whether in any case he would be entitled to maintain it save for the recovery back of the seven cents he paid. The larger relief granted of an order compelling the defendants to remove these toll gates and bars and restraining them from collecting tolls in the future, seems to be more than the plaintiff, as one of the public, is entitled to at the hands of the Court. He does not appear to suffer any special damage not suffered by the rest of Her Majesty's subjects travelling upon or using the highway, and for remedy against the obstruction, if illegal, resort should generally be had to indictment or information at the suit of the Attorney-General.

There remains the question of the defendants' right to appeal to this Court.

The action was brought to trial before Meredith, C. J., who reserved judgment, and subsequently, without disposing of the merits, ordered it to stand over to enable the plaintiff to add the corporation of the county of Elgin as a defendant, with liberty to the plaintiff to do

so. Neither party was satisfied with this disposition of the case, and both moved the Divisional Court to set aside the order of the Chief Justice and give judgment on the merits, the plaintiff asking for the relief claimed in the action, the defendants asking for a dismissal. And both parties agreed to the case being heard on the merits before the Divisional Court, and filed a consent to that effect, requesting the Divisional Court to hear and dispose of the motions. The consent further provided that it was without prejudice to the right of appeal from the judgment of the Divisional Court.

Judgment.

Moss,  
J.A.

The matter is thus brought within sub-section 4 of section 62 of the Judicature Act, 1895, 58 Vict. ch. 12 (O.), as a case where all parties agree to the same being heard before a Divisional Court; and the judgment pronounced is of the kind embraced in section 72, in which an appeal lies to this Court.

In *Re Wilson and Elgin*, 16 P. R. 150, relied upon by the plaintiff, it was sought by agreement, to bring an appeal, before a Divisional Court, which had no jurisdiction to hear an appeal in such a case, instead of before the Court having jurisdiction. The decision in that case does not, in my opinion, govern this. It was also urged on behalf of the plaintiff that inasmuch as the defendants appealed to the Divisional Court they were not entitled to appeal to this Court without leave. In view of the manner in which the case was brought before and determined by the Divisional Court, it may be questioned if sub-section 2 of section 73 of the Judicature Act, 1895, 58 Vict. ch. 12 (O.), applies. But without determining the question, it is sufficient to say that the case is one in which leave to appeal ought to be granted if necessary.

I would allow the appeal with costs, except of the motions to quash, and for leave to appeal, of which there should be no costs, and dismiss the plaintiff's action with costs.

BURTON, C. J. O., and OSLER, J. A., concurred.

*Appeal allowed.*

R. S. C.

IN RE TOWNSHIP OF CARADOC AND TOWNSHIP OF EKFRID.  
IN RE TOWNSHIP OF METCALFE AND TOWNSHIP OF EKFRID.

*Drainage—Enlargement of Drain—Work Done Beyond Limits of Initiating Township—Error in Mode of Assessment—Assessment for Future Maintenance—Drainage Act, 1894—57 Vict. ch. 56, sec. 75 (O.).*

Under section 75 of the Drainage Act, 1894, 57 Vict. ch. 56 (O.), any municipality whose duty it is to maintain any part of a drainage work constructed under the provisions of any Act respecting drainage by local assessment may, without being set in motion by any complainant, initiate proceedings for its repair and improvement and for extending its outlet, although nearly the whole of the cost is assessable against adjoining townships.

Where, however, the engineer of the initiating township assessed lands in the adjoining townships for improved outlet upon the principle that all lands within the drainage area were liable, no matter how remote from the improved outlet, though such outlet was unnecessary for their drainage or cultivation, the original outlet being in fact sufficient, his report was set aside, BURTON, C.J.O., dissenting.

*Per* BURTON, C.J.O.—A question of this kind should be dealt with by the Court of Revision, and where the engineer acts in good faith his report cannot be set aside upon such a ground.

*Per* BURTON, C.J.O.—There is no power to assess for the estimated cost of future maintenance of a drainage work.  
Judgment of the Drainage Referee reversed.

**Statement.** THESE were appeals by the township of Caradoc and township of Metcalfe from the judgment of the Drainage Referee.

The township of Ekfrid, which was the middle township, initiated proceedings for the enlargement and improvement of a drain running from a point in the township of Caradoc through the township of Ekfrid, and discharging in the township of Metcalfe. The engineer appointed by the township of Ekfrid assessed the greater portion of the cost against the township of Caradoc, and his assessment was upheld by the Drainage Referee.

The appeals were argued before BURTON, C. J. O., OSLER, and MACLENNAN, JJ. A., on the 3rd and 4th of March, 1897.

Osler, Q. C., and T. G. Meredith, for the appellants, the township of Caradoc.

J. Folinsbee, for the appellants, the township of Metcalfe.

M. Wilson, Q. C., and J. B. Rankin, for the respondents.

November 9th, 1897. OSLER, J. A. :—

Judgment.

OSLER,  
J.A.

On the 22nd of June, 1894, the township of Ekfrid passed a resolution instructing their engineer to examine and report upon the condition of government drain No. 1, and to specify such change of course, or new outlet, improvement, extension, or alteration thereof, as might seem proper for the purposes thereof. This resolution was, as appears therefrom, passed in consequence of complaints which had been made of the condition of the drain and requiring steps to be taken for its better maintenance and to prevent damage to adjacent lands. This drain was one which passed through parts of Ekfrid, Metcalfe and Caradoc, the appellant and respondent townships. It had been constructed under the Ontario Drainage Act, 1873, and it was the duty of these townships to maintain it as provided by section 70 (2) of the Drainage Act of 1894. Pursuant to the resolution referred to, the engineer made an examination of the drain, and on the 10th of May, 1895, reported the result to the township. By his report, after describing the course and condition of the drain, and stating that in his opinion it had become, through a great part of its course, from various causes, of insufficient capacity to carry away the ever increasing volume of water brought into it; that parts of it were out of repair, and that it did not form a sufficient outlet for the upper waters flowing into it, he recommended in substance that the whole course of the drain should be repaired and improved in the manner described in this report, and that for the purpose of obtaining a better outlet it should be extended to Bear creek, a distance of about 667 rods further than it had been originally constructed. The cost of the work was estimated to be \$9,900; assessed against lands and roads in Ekfrid, \$2,200; Metcalfe, \$1,750; and Caradoc, \$5,950; partly for benefit and partly, and in the case of Caradoc nearly altogether, for outlet liability. Ekfrid was the middle and Caradoc the highest of the three. Caradoc and Metcalfe appealed from the report to the Drainage

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Referee on various grounds, but chiefly on this, that the whole proceeding as initiated by Ekfrid was one unauthorized by any provision of the Drainage Act. It was also contended that the engineer had based his assessment upon a wrong principle, omitting to assess for "injuring liability," and not making proper allowances in respect of the assessment for outlet liability. Further, the appellants complained that the lands of a railway company had been omitted from the schedules of lands which are assessed, and that these should have been included and charged with their proper quota of tax, whether for benefit or outlet liability. The learned Referee held that the case came within the powers conferred by section 75 of the Act; that no substantial error of principle had been committed in the assessments, and that so far as the railway lands were concerned it was a question to be raised on appeal to the Court of Revision.

The changes introduced into the drainage laws by the legislation of 1894 are so numerous and extensive, and the powers thereby conferred upon municipalities so largely increased, that in many respects we can now derive but small assistance from cases hitherto decided, and it is better, therefore, to take the words of the new Act and try from them to find out the intention of the Legislature. We cannot, however, fail to observe that the general course of legislation seems to have been in favour of conferring increased powers upon one township or a lower township to affect other townships, and to impose very heavy burdens upon the latter where their waters, even merely as the result of gravitation, pass into drainage works constructed by the former.

Section 75 of the present Act, though founded largely upon section 585 of the Municipal Act of 1892, is practically a new section. It enacts, reading it for the purposes of the case at bar, that wherever for the better maintenance (that is to say, the preservation and keeping in repair), of any drainage work constructed under the provisions of any Act respecting drainage by local assess-

ment, or to prevent damage to any lands or roads, it shall be deemed expedient

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(a) to change the course of such drainage work,

(b) or make a new outlet for the whole or any part of the work,

(c) or otherwise improve, extend, or alter the work, the municipality or any of the municipalities whose duty it is to maintain the said drainage work may, without the petition required by section 3 of the Act, but on the report of an engineer appointed by them to examine and report on the same, undertake and complete the change of course, new outlet, improvement, extension, or alteration, specified in the report, and the engineer shall, for such change of course, new outlet, improvement, extension, or alteration, have all the powers to assess and charge lands and roads in any way liable to assessment under the Act for the expense thereof, in the same manner, and to the same extent, by the same proceedings, and subject to the same right of appeal, as are provided with regard to any drainage work constructed under the provisions of the Act.

We have then here a drain which comes within one of the classes of drains to which the section applies, and one of the municipalities, namely, Ekfrid, whose duty it was to maintain it. What are Ekfrid's powers? Clearly their exercise is not limited to the boundaries of its own municipality: sections 3-59, nor has that been contended. Section 75 is an extension and enlargement of the power or duty to maintain and repair, cast upon the municipality by section 70, sub-section 2, and it may, in my opinion, be acted upon in good faith by the municipality without being set in motion by any particular complainant where they deem it advisable, even though the result of their action is to cast the larger portion of the cost of the work upon some other municipality. We are not concerned with what may appear to us the apparent injustice of the proposed scheme to the latter municipality; all we have to see is whether what is done is within the scope of the powers which the Legislature has conferred upon the initiating

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municipality. That, in my opinion, is the case here. For the better maintenance of the drain the council of Ekfrid, adopting the report of the engineer, has determined in part to change the course of the drain, to make a new outlet, and to extend and otherwise improve it. Their action in this respect seems to me to be within the very words of the section. We had to consider the section in the recent case of *In re Stonehouse and Plympton*, 24 A. R. 416, and the construction we then placed upon it embraces in principle the case before us, although there the drain in respect of which the council initiated the proceedings was one wholly within their own municipality. I therefore agree with the judgment of the Referee on this part of the case.

Then as to the principle on which the engineer has gone in making his assessment.

I feel, I must say, great difficulty in adopting it. Section 3 requires him to make an assessment of the lands and roads to be benefited, and of any other lands liable to be assessed as thereafter provided, stating, as nearly as may be in his opinion, the proportion of the cost of the work to be paid by every road and lot or portion of lot (a) for benefit, (b) and for outlet liability, and (c) relief from injuring liability as afterwards defined: sec. 3, sub-sec. 1, latter part. This is also, again, by section 12, expressly required to be done by the engineer in his report.

I need not further refer to the assessment for benefit. Assessment for relief from injuring liability seems to be the same thing as assessment for what is defined, or rather described as "injuring liability" in sub-section 3 of section 3, viz., the assessment of lands from which water is "by any means caused to flow upon and injure" other lands; the assessment being for the cost of the drainage work necessary for relieving the injured lands from such water.

The engineer has not assessed any lands under this head of liability. A perusal of the evidence satisfies me that the Referee was right in holding that the report was not open to substantial objection on this ground.

The bulk of the assessment in Caradoc is for "outlet

liability." This is described or defined in sub-section 4 of section 3. The lands and roads of any municipality, company or individual, using any drainage work as an outlet, or for which, when the work is constructed, an improved outlet is thereby provided, either directly or through the medium of any other drainage work, etc., may be assessed and charged for the construction and maintenance of the drainage work so used as an outlet, or providing an improved outlet, and to the extent of the cost of the work necessary for any such outlet, as may be determined by the engineer, etc. Such assessment may be termed "outlet liability."

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OSLER,  
J.A.

The express power under section 75 is to assess for the expense of the works undertaken under that section the lands and roads in any way liable to assessment under the Act.

Now, the lands in Caradoc which have been assessed by the engineer already had an outlet by means of government drain No. 1, so far as they directly or intermediately drained through it. The great bulk of these lands needed no other outlet than that which they already had. Their lands lay high and the drainage they already had was sufficient for them. For that work they had already paid, and what they are now charged for is a new work not giving them any new outlet. It is plain from the evidence of the engineer that, so far as they are concerned, the work does not give them an improved outlet. I speak now of the large bulk of the property assessed, for there may be cases of a few lots along the course of the drain, the outlet of which is improved, or which are distinctly benefited by the new work. What I regard as objectionable in the principle which the engineer seems to have adopted is this, that, to use his own language, he has taxed the lands because they contribute water to the area drained, charging lands within that area with outlet expenses, no matter how remote they are, and although the new work, or perhaps the drain itself, is not necessary for the cultivation or drainage of the land.



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OSLER,  
J. A.

Unless the work, when constructed, would provide an improved outlet for the lands in Caradoc directly, or, as under the new Act may perhaps now be the case, indirectly, I cannot see what power the engineer had to assess them for such work, and this affects so large a proportion of the sum charged against that township that it appears to me the Referee should have given effect to Caradoc's appeal, and overruled the report of the engineer. Where so extensive a scheme is proposed by a lower township, affecting in such a serious manner the lands in an upper township, which derive no benefit from it and which are not subject to be assessed for benefit or for injuring liability, I think it should be made to appear that what is done is clearly brought within the powers which the Legislature has conferred upon the initiating municipality. I am therefore of opinion that the appeal of Caradoc should be allowed, and inasmuch as the effect of doing so necessarily is under the circumstances to quash the proposed scheme, I think the appeal of Metcalfe must also be allowed.

MACLENNAN, J. A. :—

After a most careful consideration of this case, and the various sections of the Drainage Act, and of the arguments which were addressed to us, I have come to the same conclusions as my brother Osler upon the several matters dealt with in the judgment which he has just delivered.

BURTON, C. J. O. :—

This appeal, and a similar appeal from the township of Metcalfe, against the report of James Robertson, O. L. S., were, by consent, heard together by the learned Referee, who decided the main question adversely to the two townships who are now appellants to this Court, and the same were in like manner heard together before us.

Both of the present appellants contend that Ekfrid had no power under section 75 of the Act of 1894, to do the pro-

posed work, and if I understand their contention, it is that jurisdiction only arises when it is established that the proposed works are necessary to prevent damage to lands or roads, or it is shewn that the proposed works will better maintain and keep in repair the whole work, and that they do not come within the section inasmuch as they were not bound to repair the whole work, but only that portion of it that is within their own confines. I think that would be too narrow a construction to place upon the section.

It appears to me that whenever we find a drainage work wherein several municipalities are interested, if any one of those bodies had reason to believe that a change was required for either of the objects above referred to, it may, of its own motion, initiate proceedings by appointing an engineer to examine and report, and if that report, on either of the grounds, is in favour of the proposed work, may proceed to assess and charge the lands and roads in any way liable to assessment for the expense thereof, in the same manner and to the same extent, by the same proceedings and subject to the same right of appeal, as are provided with regard to any other drainage work.

I agree, therefore, with the learned Referee, that the township of Ekfrid had jurisdiction to pass the by-law sought to be impeached.

I agree also with him that although it seems somewhat anomalous for a township having so little to complain of as the township of Ekfrid initiating so costly a work against the wish of the objecting townships, and assessing them for so large a sum, we must, in the absence of evidence of bad faith and on the assumption that the officer upon whom the duty is thrown by statute is a competent man and is acting within the scope of his authority, uphold his report.

In the absence of fraud, or evidence that any erroneous principle has been adopted by the engineer, it is not, I think, competent to us to review the grounds of his decision.

The assessment upon the township of Caradoc appears

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BURTON,  
C.J.O.

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C.J.O.

to be very large in comparison with those of the other townships, and I agree with the learned Referee that in a proceeding under this section, where the initiating municipality is relieving itself of a burden and placing it on others, the Court ought to scrutinize the proceedings very carefully, and if they find that the engineer has exceeded his authority or proceeded to assess upon a wrong principle, his report should not be sustained; but for the reasons I have mentioned and upon the principle that in such circumstances the maxim "*Omnia rite acta presumuntur*," applies, I think the onus is upon the parties impeaching the transaction to shew this and not to leave it to inference. It is true that in some cases the drain already there furnished a sufficient outlet, but it is proved that it was found to be much too small for the purposes for which it was originally constructed, and the engineer testifies "that it is so much less than is really required to carry the water, that I cannot imagine that the drain was constructed near its proper size," and there is evidence that even the present proposed works are not extensive enough. I do not feel, therefore, that a case has been made out for our reversing the judgment of an engineer, presumably competent, which has been confirmed by the intermediate tribunal. If any particular lot has been improperly assessed for outlet that is a matter to be set right by the Court of Revision.

No ground, therefore, has, in my opinion, been shewn for interfering with the engineer's report upon this ground.

As to his assessing for future maintenance, no authority has been cited, or any section of the Act referred to, which, in my opinion, authorizes such assessment, and, I think, the learned Referee was right in holding that portion of his report to be *ultra vires*.

But I am of opinion, after a careful perusal of the Act, that the Referee is equally without jurisdiction, that the assessing for future maintenance is a "*casus omissus*," and that it must be left to the Legislature to deal with the present case. No injury is likely to occur from this deci-

sion, as any assessment for maintenance may not arise for some time.

Judgment.  
BURTON,  
C.J.O.

If I am right in assuming that the council of Ekfrid—*mero motu*—could initiate the proceedings, the objection as to the engineer not assessing for “injuring liability” falls to the ground.

On the whole, I am of opinion that the appeal against the judgment of the Referee should be dismissed, but that the judgment should be varied by striking out that portion of it which deals with the assessment for future maintenance, but as the majority of the Court think differently the appeal will be allowed.

*Appeal allowed, BURTON, C. J. O., dissenting.*

R. S. C.

#### BAKER V. FOREST CITY LODGE.

#### PARKHOUSE V. DOMINION LODGE.

*Benevolent Societies—Alteration of Rules—Reduction in Amount of Sick Benefit.*

THESE were appeals by the plaintiffs from the judgment of BOYD, C., reported 28 O. R. 238, and were argued before BURTON, C. J. O., OSLER, MACLENNAN, and MOSS, JJ.A., on the 23rd of September, 1897.

*I. F. Hellmuth, and W. C. Fitzgerald, for the appellants. Shepley, Q. C., and R. K. Cowan, for the respondents.*

November 9th, 1897. The appeals were dismissed with costs, the Court agreeing with the reasons for judgment reported below.\*

R. S. C.

\* See *Smith v. Galloway*, [1898] 1 Q. B. 71.

## MCMICKING V. GIBBONS.

*Mortgage—Interest—Redemption—R. S. O. ch. 111, sec. 17.*

In an action of redemption by a second mortgagee against a first mortgagee the latter is entitled to only six years' arrears of interest.

*Delaney v. Canadian Pacific R. W. Co.*, 21 O. R. 11, overruled on this point.

Judgment of MEREDITH, C.J., reversed.

**Statement.** THIS was an appeal by the plaintiff from the judgment of MEREDITH, C.J.

The plaintiff was the mortgagee of certain lands under a mortgage made in her favour on the 27th of October, 1885, by one Walter Cunningham, and her mortgage was subject to a prior mortgage upon the same lands, made by Walter Cunningham in favour of one George Cunningham, on the 25th of May, 1877, payable, with interest in the meantime half-yearly at eight per centum per annum, on the 25th of May, 1885. George Cunningham died on the 20th of June, 1887, and the defendant James Cunningham was his executor. On the 6th of July, 1895, Walter Cunningham made an assignment for the benefit of his creditors to the defendant Gibbons. Neither the plaintiff, nor George Cunningham, nor his executor, had been in possession of the mortgaged lands.

Both mortgages were in arrear in October, 1895, and the plaintiff then applied to the defendant James Cunningham for an assignment of the first mortgage, and tendered to him the principal and six years' interest at six per cent. James Cunningham claimed payment of the principal and interest for about sixteen years at the mortgage rate compounded, and upon the refusal of the plaintiff to accede to this claim gave notice of his intention to sell the lands under the power of sale. This action was thereupon brought asking for an injunction and for redemption, and it was then agreed between the parties that the sale proceedings should not be proceeded with, pending the determination of the question of the amount of interest payable.

The action was tried at Goderich, on the 13th of May, 1896, before MEREDITH, C. J., who held that the defendant James Cunningham could, after the maturity of the mortgage, recover only simple interest at the rate of six per centum per annum, but that, on the authority of *Delaney v. Canadian Pacific R. W. Co.*, 21 O. R. 11, and contrary to his own opinion, interest for sixteen years should be allowed. Statement.

The plaintiff appealed and the appeal was argued before BURTON, C. J. O., OSLER, MACLENNAN, and MOSS, JJ. A., on the 27th of September, 1897. There was no cross-appeal.

Garrow, Q. C., for the appellant. The authorities shew that if a sale is actually made and the purchase money received by the mortgagee, he can retain whatever may be due to him for arrears of interest. Apart from this, only six years' arrears are payable. The general rule is clear that the price of redemption is the same in a redemption as in a foreclosure suit: *People's Loan and Deposit Co. v. Grant*, 18 S. C. R., at p. 278; *Sober v. Kemp*, 6 Ha. 160; *Du Vigier v. Lee*, 2 Ha. 326. There is a lien for six years' arrears, and subject to that the second mortgagee's rights accrue: *Mason v. Broadbent*, 33 Beav. 296; Banning's Statute of Limitations, 2nd ed., p. 173. *Edmunds v. Waugh*, L. R. 1 Eq. 418, is relied on, but that is a case of retainer. It was followed in *In re Marshfield, Marshfield v. Hutchings*, 34 Ch. D. 721; and *Ford v. Allen*, 15 Gr. 565, but in each case there had been a sale, and there arose merely a question of set-off. The learned Chief Justice here follows *Delaney v. Canadian Pacific R. W. Co.*, 21 O. R. 11, but that was an action of trespass, and the plaintiff was entitled to the full value of the land. In some cases interest for more than six years has been allowed, but that is where there is no intervening encumbrancer, and to avoid circuity of action: *Airey v. Mitchell*, 21 Gr. 510; *Howeren v. Bradburn*, 22 Gr. 96; *Carroll v. Robertson*, 15 Gr. 173; *Allan v. McTavish*, 2 A. R., at p. 286; *Taylor v. Hargrave*, 19 Gr. 271. The case comes

**Argument.** within the Limitation Act. There is a recovery, and it is immaterial whether the person to pay is plaintiff or defendant.

*Philip Holt*, for the respondent, James Cunningham. This is not a mere question of redemption. It is an attempt to restrain sale proceedings, and the plaintiff has demanded an assignment of the mortgage, and cannot compel this defendant to assign the mortgage to her on payment of the principal and six years' interest, and then herself enforce the mortgage for the full amount due. It is clear that if a sale had been made, the respondent could have retained out of the purchase money all the arrears, and he should now be treated as if in that position, notice of his intention to sell having been in good faith given. Then it must be borne in mind that the executor of a mortgagee is bound to assign only upon payment of what is due for principal and interest: R. S. O. ch. 102, sec. 12. Apart from this the respondent is entitled to the arrears claimed. The case is not within the Limitation Act, which applies only to action or distress: R. S. O. ch. 111, sec. 17.

*Garrow, Q. C.*, in reply.

November 9th, 1897. OSLER, J. A. :—

The weight of authority, perhaps I should say the tendency of the decisions, undoubtedly points to the result at which my brother Moss has arrived in his judgment, which I have had an opportunity of reading, and in which I feel bound to concur. I doubt if I should myself have been able to arrive at that result, namely, that the 17th section of the Real Property Limitation Act, R. S. O. ch. 111, applies to a redemption action by the mortgagor, or a subsequent encumbrancer, from the terms of the section alone.

"No arrears of rent, or of interest in respect of any sum of money charged upon or payable out of any land or rent, or in respect of any legacy, or any damages in respect of such arrears of rent or interest, shall be recovered—not in, but—by any distress, or action, but within six years," etc.

This language seems naturally to point to some active proceeding taken by the party claiming such rent or interest to recover the same. An action of foreclosure by the mortgagee might well be deemed to be such a proceeding, while in an action for redemption by the mortgagor he stands merely passive, willing and ready to be redeemed on payment of what the mortgagor has covenanted to pay. Courts of Equity, however, seem to have felt themselves hampered by the practice in a redemption suit and by the axiom that the price of redemption is the same in a redemption as in a foreclosure suit, and that is perhaps not an unreasonable way in which to construe the section, the result of the mortgagor's failure to redeem being usually foreclosure, to effect which the mortgagee must become to some extent an actor in his turn in the mortgagor's suit, although, indeed, when he does the time for redemption by the mortgagor in that suit is past.

Judgment.

OSLER,  
J.A.

MACLENNAN, J. A. :—

The question is whether the defendant James Cunningham, is entitled, as against the plaintiff, to more than six years' arrears of interest upon his testator's mortgage. The learned Chief Justice, in deference to the judgment of the Divisional Court in *Delaney v. Canadian Pacific R. W. Co.*, 21 O. R. 11, and contrary to his own opinion, has decided that he is. It is not necessary to say whether that case was rightly decided or not, but so far as it may be regarded as deciding that in a case like the present more than six years' arrears can be recovered, I am unable to agree with it. In the present case the mortgagor is not before the Court, having parted with his equity of redemption to the defendant Gibbons; there is, therefore, here no question of the effect of the mortgagor's covenant for payment, as determining the amount of arrears to be recovered. This action is by a second mortgagee claiming to redeem the first mortgagee and to foreclose the assignee of the equity of redemption. I have frequently



**Judgment.** had occasion to consider the question, and I have again  
**MACLENNAN, J.A.** gone over all the cases, and I am clearly of opinion that with reference to the application of the statute there is no difference between a foreclosure and a redemption action. I think that is the effect of the well known cases cited by the Chief Justice; and besides, I think it is apparent that to hold otherwise would produce the greatest confusion in mortgage actions, which nearly always partake of both characters, both redemption and foreclosure, always necessarily do whenever as in this case there is more than one encumbrance. In the present case the defendant Gibbons being satisfied that the property was not of any greater value than the two mortgages has submitted to a judgment of foreclosure. But suppose he had not, as to him it is a foreclosure action, and it could not be disputed that neither mortgagee could recover more than six years' arrears against him, the first mortgagee not having been in possession. Therefore, in taking the accounts, arrears for six years only could be charged against Gibbons, while if the judgment were to stand, the first mortgagee must have full arrears as against the plaintiff. Then if the plaintiff redeemed the first mortgagee, he could only add a part of what he was obliged to pay to his own debt as against Gibbons, and upon final redemption would be out of pocket to the extent of the difference.

The real question to be determined is, what is the proper construction of the enactment (R. S. O. ch. 111)? Section 17 declares that no arrears of interest in respect of any sum of money charged upon or payable out of any land or any damages in respect of such arrears of interest shall be recovered by any distress or action but within six years, etc.; and then section 18 provides that where any prior mortgagee or other encumbrancer has been in possession of any land, or in the receipt of the profits thereof, within one year next before an action is brought by any person entitled to a subsequent mortgage or other encumbrance on the same land, the person entitled to such subsequent mortgage or encumbrance may recover in such action the arrears

of interest which have become due during the whole term that such prior mortgagee or encumbrancer was in such possession or receipt as aforesaid. The original Act used the words "distress, action, or suit," but after the Judicature Act the word "suit" was dropped, the old distinction between actions at law and suits in equity having been done away.

Judgment.

MACLENNAN,  
J. A.

Another Act, R. S. O. ch. 60, enables an action on the covenant for payment in a mortgage to be brought within twenty years, now ten years by 56 Vict. ch. 17 (O.). The English Acts are substantially the same as ours, and it was long ago decided in *Hunter v. Nockolds*, 1 Mac. & G. 640, and may now be considered as settled, that sections 17 and 18 now in question have relation to the recovery of interest by distress upon or action to enforce the charge against the land, and not to actions upon the covenant. That being so, it is evident that the suit mentioned in sections 17 and 18 meant the usual suit in Chancery in respect of a mortgage or other encumbrance, commonly called a foreclosure or redemption suit according as it was commenced by the encumbrancer or by the owner of the land. Now, by whomsoever the suit was brought, its character and result were the same. It was both a foreclosure and a redemption suit, and the judgment or decree in both cases was the same. The mortgagee or encumbrancer in either case came in and proved his claim, it was ordered to be paid, and in default there was either a foreclosure or a sale. He either recovered his debt, or the debtor was foreclosed, and whether the mortgagee was plaintiff or defendant, if he recovered his debt and interest, he literally recovered it in and by means of the suit. Now, what the statute says is that arrears of interest shall not be recovered by any action, but within six years, not saying by whom it is brought, and I think it is perfectly clear that a redemption action is within the very words of the Act as well as an action of foreclosure.

Soon after the Act was passed in England it was argued

**Judgment.** that a foreclosure suit was not within its meaning, because  
**MACLENNAN,** it was not a suit to recover money but to foreclose the  
**J.A.** equity of redemption, and that the option of redeeming the estate was a privilege granted by the Court to the mortgagor. That contention was promptly overruled by the Vice-Chancellor, Sir James Wigram, in *DuVigier v. Lee*, 2 Ha. 326, which though overruled afterwards on the main question has never been doubted on this point. The important circumstance is that whether the action be brought by himself or by a subsequent mortgagee or by the owner of the equity of redemption, the first mortgagee comes into the Master's office, proves his claim, and obtains the decree or judgment of the Court for its payment; and I confess I never could understand why, if that resulted in payment, it was not a recovery of his debt by an action whether he was plaintiff or defendant.

It was, however, contended by Mr. Holt, that having taken steps to exercise the power of sale contained in his mortgage his client ought to be in the same position as if he had sold the property and had the purchase money in his possession, in which case he could retain a sufficient sum to satisfy full arrears, on the authority of *Edmunds v. Waugh*, L. R. 1 Eq. 418. It is enough to say, however, that there has been no sale, and that the defendant has not the purchase money in his possession, and it is impossible, therefore, to apply the doctrine of that case here. The plaintiff was not bound to permit the sale to go on, but had a right to have it stayed on paying into Court a sufficient sum to pay the defendant's legal demand, when its amount was ascertained, and I do not see, though it is not necessary to decide the point, that the defendant could in a case like the present claim to be paid more than six years' arrears out of the fund in Court.

The appeal must be allowed, and the terms of the reference must be amended accordingly. The respondent must pay the costs of the appeal, and also the costs of the action.

Moss, J. A. :—

Judgment.

Moss,  
J.A.

The exact case presented by this appeal does not appear to have ever come before the Courts of England or this Province for decision. Indeed, so far as the Courts of England are concerned, the effect of section 42 of 3 & 4 Wm. IV. ch. 27 (the same in substance as section 17 of R. S. O. ch. 111), upon the position of a mortgagor in an action of redemption brought by him against the mortgagee, where there were more than six years' arrears of interest, appears not to have arisen so as to call for decision : see Darby and Bosanquet's Statutes of Limitations, 2nd. ed. pp. 204, 206.

In this Province that question was dealt with in *Howeren v. Bradburn*, 22 Gr. 96 (1875). The plaintiff had mortgaged lands to the defendant and had covenanted to pay the amount secured with interest. He filed his bill for redemption and on taking the account the Master allowed the defendant thirteen years' interest. Upon appeal, Blake, V.-C., considered that under the Administration of Justice Act, as no encumbrancer intervened, the defendant was entitled to recover the whole thirteen years' interest.

He thought that, inasmuch as the defendant could prove for the principal and six years' arrears of interest, and then go to a Court of law and recover on the covenant the seven years' further arrears and put his *fi. fa.* in the hands of the sheriff and thus charge the lands with the thirteen years' arrears, he would not be carrying out the spirit of the Administration of Justice Act if he granted the partial relief by giving the six years' arrears and left the defendant to his common law remedy for the balance. He said (p. 98): "Here the specific charge is only allowed to the extent of six years, but then there is the general charge by virtue of the covenant which coalesces with the specific charge, and thereby the defendant is enabled to recover all the interest that is due."

The effect of the decision was to add to the price of redemption a sum which could not theretofore have been added by the mortgagee in a foreclosure suit.

Judgment.

Moss,  
J.A.

It is to be observed, however, that it does not proceed upon any supposed distinction as to the right of a mortgagee to be allowed greater arrears of interest in a redemption than in a foreclosure suit. It is based upon the effect of the provisions of the Administration of Justice Act, by means of which the mortgagee was enabled to obtain in the suit in the Court of Chancery a judgment on the covenant in his mortgage, which, prior thereto, he could only have obtained by recourse to a Court of law. And it was by means of the judgment, and not by means of the mortgage, that the further charge was imposed upon the mortgaged land.

After the Judicature Act, Proudfoot, J., in *Macdonald v. Macdonald*, 11 O. R. 187 (1886), applied the principle of *Howeren v. Bradburn*, 22 Gr. 96, in a case of foreclosure against the mortgagor. He observed: "It is true that *Howeren v. Bradburn* was a case of redemption, but the whole *ratio decidendi* proceeds upon the ground that the price of redemption and foreclosure is the same."

After quoting from V.-C. Blake's judgment he proceeds: "That reasoning applies as fully to a case of foreclosure as of redemption."

It may not be unreasonable in an action to which the mortgagee and mortgagor are the only parties, there being no intervening encumbrancers, to grant the mortgage judgment upon the covenant for the arrears of interest beyond six years, and award execution thereof against the land.

But whether the latter sum ought to be immediately added to the amount provable against the lands in respect of the mortgage, thereby compelling the mortgagor to pay the whole sum in six months or be foreclosed of his land is open to serious question. The law gives twelve months from the delivery of a *fi. fa.* against lands to the sheriff within which the judgment debtor may pay the judgment and relieve his lands from it.

There seems no good reason why the mortgagee should be entitled to foreclose unless payment of the amount of the judgment is made within a shorter period.

But, however that may be, the contention of the defendant in this case seeks to extend the rule of *Howeren v. Bradburn*, and *Macdonald v. Macdonald*, and to apply it to the case of a subsequent mortgagee seeking to redeem the first mortgage and foreclose the mortgagor, or his representatives. There is here no case of a covenant by the plaintiff with the mortgagee for payment of his mortgage money and interest.

It is the case suggested by Blake, V.-C., in *Howeren v. Bradburn*, 22 Gr. 96, of an intervening encumbrancer. And in *Crone v. Crone*, 27 Gr., at p. 429, he points out that *Howeren v. Bradburn* decides nothing where encumbrancers would be affected.

The dictum of Sir R. Kindersley in *Edmunds v. Waugh*, L. R. 1 Eq. 418, with regard to a mortgagor who has failed for six years to pay the interest he was liable to pay, has no application to the plaintiff in this case.

She is seeking to be allowed to redeem the land upon payment of the amount properly chargeable against it under the first mortgage. How is that amount to be ascertained? If the mortgagee were proceeding for foreclosure of his mortgage it cannot be doubted that as against the second mortgagee the account would only be taken on the footing of section 17 of R. S. O. ch. 111, and no more than six years' arrears of interest could be charged. This is all the second mortgagee would be required to pay in order to redeem and entitle herself to a reconveyance of the mortgaged premises. The reconveyance of the land by the mortgagee in such case would not interfere with his right to recover from the mortgagor on his covenant any further arrears of interest that remained. But as respects the second mortgagee the land is cleared of all beyond six years' arrears. Is a different rule to be applied to her because she comes herself to the Court seeking to redeem the prior mortgagee?

In *People's Loan and Deposit Co. v. Grant*, 18 S. C. R., at p. 278 (1890), the Chief Justice of Canada speaks of the principle that the price of redemption is to be the same in

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a redemption as in a foreclosure suit, as well established. The Court was not there dealing with the case of more than six years' arrears of interest charged on land, but most of the authorities to which the learned Chief Justice referred are cases in which that was in question.

In *DuVigier v. Lee*, 2 Ha. 326 (1843), the effect of 3 & 4 Wm. IV. ch. 27, sec. 42, and 3 & 4 Wm. IV. ch. 42, sec. 3, upon the right of a mortgagee of lands who also held a covenant from his mortgagor for payment of the principal and interest was under discussion. The actual decision in that case was, that notwithstanding the provisions of section 42 of 3 & 4 Wm. IV. ch. 27, the mortgagee was entitled in a foreclosure suit to charge the mortgaged estate with the full arrears of interest accruing on the mortgage within twenty years before the institution of the suit.

That decision was afterwards in effect overruled in *Hunter v. Nockolds*, 1 Mac. & G. 640 (1850), and many cases have since affirmed that the view taken by V.-C. Wigram of the effect of the two statutes was not the correct one. The view that ultimately prevailed is stated in *Airey v. Mitchell*, 21 Gr., at p. 512 (1874), where Blake, V.-C., says: "The result of the authorities is that no more than six years' arrears of interest, in respect of a sum of money charged upon or payable out of land, can be recovered by suit; except in an action upon the covenant, in which case the limitation shall be twenty years."

But in *DuVigier v. Lee*, 2 Ha. 326, the Vice-Chancellor affirmed that as a general proposition, the relative rights of mortgagor and mortgagee are the same in a bill to redeem as in a bill to foreclose, at least as to the price of redeeming the mortgage. And he goes on to say (p. 334): "I think, that in order to determine the price of redemption upon a bill to redeem a mortgage, the Court ought to inquire what the terms of redemption would be in a suit to recover the mortgage money out of or by means of the charge upon the land; and if, on the result of that inquiry, the Court should find that in a suit for foreclosure, or other suit seeking to affect the land, no more than six

years' interest would be recoverable by the mortgagee, I think it would be bound to fix the same limit in determining the price of the redemption in a suit to redeem." Judgment.

Moss,  
J.A.

In *Sober v. Kemp*, 6 Ha. 155 (1847), he again states his view as follows (p. 160): "It has always appeared to me, that the terms on which a mortgagor or those claiming under him are entitled to redeem must be the same, whether they are to be ascertained in a suit for redemption or for foreclosure. It is truly said that a plaintiff seeking equity must do equity; but in determining what is equity, the question is, what are the duties or the liabilities which his situation at the time of instituting the suit imposes, and not whether he is plaintiff or defendant."

*Elvy v. Norwood*, 5 DeG. & Sm. 240 (1852), was the case of a bill to redeem by the heirs of a mortgagee. Vice-Chancellor Parker appears to have considered the general principle to be that the only arrears of interest that were chargeable upon the land were arrears for six years. And apparently if the bill had been by the mortgagor himself the Vice-Chancellor would have held him entitled to redeem on payment of six years' arrears, although he had covenanted for payment of interest.

But on the ground that the heirs who were entitled to the land were bound by the covenant to the extent of the assets descended to them, and that the mortgagee had a right to tack the covenant as against them, although he could not as against their ancestor, he held the mortgagee entitled to all the arrears.

In *In re Stead's Mortgaged Estates*, 2 Ch. D., at p. 718 (1876), Vice-Chancellor Malins doubted whether *Elvy v. Norwood*, 5 DeG. & Sm. 240, is quite consistent with the later decisions, but at all events it decided nothing opposed to the plaintiff's position in this case.

Why should not the well established principle that the price of redemption is to be the same in a redemption as in a foreclosure action apply to this case? I do not think it is an answer to say that the mortgagee is not seeking to recover more than six years' arrears of interest by action



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or suit. There is an action in which one question is what is the amount of the mortgagee's claim upon the lands. In this Province, before the 6th of February, 1865, by the settled practice of the Court the dismissal of a bill for redemption for default of redemption by the plaintiff operated as a foreclosure against him. By Chancery Order No. 24, of the 6th of February, 1865, it was provided that in case of failure of the plaintiff in a redemption suit to redeem, the bill need not be dismissed, but that where there were other defendants, the plaintiff might be foreclosed and directions given and other proceedings taken as and with the same effect as in a foreclosure suit.

This order has been carried into the rules and is now Consolidated Rules Nos. 391 and 392.

Probably the mortgagee is not obliged to avail himself of the right to proceed to foreclosure under these Rules, but whether he takes a dismissal of the bill, or an order of foreclosure against the plaintiff, the effect is the same as regards the latter's rights. He is foreclosed of his equity of redemption. Either way the mortgagee is recovering against the lands the amount chargeable against them in respect of his mortgage.

If it is to be held that because this is a redemption action the first mortgagee is to be entitled to claim and be allowed more than six years' arrears of interest, then the plaintiff, in order to prevent herself from being foreclosed of the lands, is obliged to pay more than she would in order to redeem them in an ordinary foreclosure action; the price of redemption is not to be the same. Yet the first mortgagee is in both cases recovering the interest by means of an action.

I am of opinion that the plaintiff in this action is entitled to invoke the provisions of section 17 against the defendant James Cunningham, executor of the prior mortgagee, and that the latter is only entitled to payment from the plaintiff of six years' arrears of interest.

The judgment drawn up does not require the defendant James Cunningham to assign his mortgage upon payment

of the amount found due to him, but only to reconvey the mortgaged premises. And the same direction should stand in the altered judgment, so as not to interfere with the mortgage or the covenants for payment contained in it.

Judgment.

Moss,  
J.A.

BURTON, C. J. O. :—

I am of the same opinion.

*Appeal allowed.*

R. S. C.

# BUILDING AND LOAN ASSOCIATION V. MCKENZIE.

## *Mortgage—Leasehold—Acquisition of Reversion by Mortgagor.*

Where the assignee of a term, subject to a mortgage of the term and of the rights of renewal and of purchase given by the lease, exercises the right of purchase, the mortgage becomes a charge upon the fee, and the purchaser has no lien upon the fee for the amount of the purchase money in priority to the mortgage.

Judgment of MEREDITH, C.J., 28 O. R. 316, *affirme* .

THIS was an appeal by the defendant from the judgment of MEREDITH, C. J., reported 28 O. R. 316.

The plaintiffs were mortgagees, by way of assignment, of a lease and of the rights of renewal and purchase thereby given. The defendant was a subsequent mortgagee, by way of assignment, of the same lease and rights of renewal and purchase. He exercised the right of purchase and acquired the fee, and MEREDITH, C. J., held that this purchase enured to the benefit of the plaintiffs, whose mortgage became a charge on the fee. The facts are more fully stated in his judgment.

The appeal was argued before BURTON, C. J. O., OSLER, MACLENNAN, and MOSS, JJ. A., on the 28th of September, 1897.

**Argument.** *Laidlaw*, Q. C., and *D. W. Saunders*, for the appellant. The distinction between this case and the authorities relied on below is that here there is no trust and the plaintiffs' mortgage is not interfered with or impaired. The cases cited turn on the right of renewal being interfered with. Here the original lease stands and the mortgagees are entitled to renewals and to all other rights given to them. The principle applicable is seen in *Randall v. Russell*, 3 Mer. 190. And see also *Lumley v. Timms*, 28 L. T. N. S. 608; Coote's Law of Mortgage, 5th ed., p. 268.

*H. J. Scott*, Q. C., and *A. Cassels*, for the respondents. Upon the special facts of this case the defendant is estopped from raising this defence and it is untenable in law. The doctrine of accretion applies. *Doe v. Pott*, 2 Doug. 709, is one of the earliest examples of this, and that case has never been doubted: see *Ex parte Bisdee*, 1 M. D. & DeG. 333; *Leigh v. Burnett*, 29 Ch. D. 231; *In re Lord Ranelagh's Will*, 26 Ch. D. 590; *Landowners West of England, etc., Co. v. Ashford*, 16 Ch. D. 411, at p. 433; *Moody v. Matthews*, 7 Ves. 174; *Doe v. Vickers*, 4 A. & E. 782; *Hughes v. Howard*, 25 Beav. 575; *Beddoo's Law of Mortgage*, p. 83; *Ashburner on Mortgages*, pp. 100, 178.

*Laidlaw*, Q. C., in reply.

November 9th, 1897. MACLENNAN, J. A.:—

This is an appeal from a judgment of Meredith, C. J., reported in 28 O. R. 316, where the facts and instruments upon which the judgment must depend are fully stated.

I am of opinion that the judgment is right, and for the reasons given by the learned Chief Justice, and, therefore, I do not think it necessary to add much to what he has well expressed.

I do not doubt that if the lease to Thompson had been merely a lease for years, without any covenant for renewal, or option to purchase, the plaintiffs would still, on the authority of *Leigh v. Burnett*, 29 Ch. D. 231, and other

cases relied on by the learned Chief Justice, be entitled to judgment; but I think that right is made much clearer and stronger, when those stipulations in the lease, particularly the option to purchase, are regarded.

Judgment.  
**MAULENNAN,**  
J.A.

The mortgage to the plaintiffs was not only of the term, but of the right of renewal, and the option to purchase the fee, contained in the lease. After making his mortgage to the plaintiffs, Thompson assigned the lease with all its stipulations to Smith, and it was Smith who mortgaged to the defendant, by an assignment absolute in form, but intended as a security. Some time after the making of both mortgages Britton became the owner of the reversion, and the situation then became as follows: Britton, owner of the freehold reversion; Smith, owner of the equity of redemption in the lease and the stipulations contained therein; the plaintiffs, first mortgagees; and the defendant, second mortgagee of the term; both mortgages including the right of renewal, and the option to purchase the reversion in fee.

In 1895, when both mortgages were in default, the defendant exercised the option of purchase, and obtained a conveyance of the reversion from Britton, reciting the lease and the option to purchase contained therein, and that the same were vested in the defendant. The defendant paid the purchase money, and having got his conveyance, he now has the legal estate in the land, and the question is whether he can hold it in a Court of Equity against the plaintiffs.

The question concerns the legal title alone, for the option to purchase having been exercised by one who had a right to do so, the term and the right of renewal are gone forever; and if the defendant has a right to withhold the legal estate from the plaintiffs, then the result is, that, where before the defendant was second mortgagee, and the plaintiffs first, the defendant is now first mortgagee, and the plaintiffs are second. The purchase by defendant was made by virtue of his authority as mortgagee of the option, and he has the same right to be repaid his purchase money

**Judgment.** by Smith as he has to be paid his mortgage money. If he can claim priority over the plaintiffs for the purchase money which he has paid, he can equally claim priority for his mortgage debt. The answer to that contention, however, appears to me to be quite simple and plain, and that is, that both plaintiffs and defendant were mortgagees of the option, the plaintiffs first, and the defendant second, and when the option was exercised and the reversion purchased, the priority must remain the same. When the purchase was made, it was the plaintiffs who were entitled to the conveyance, because they had the first right as first mortgagees of the contract of purchase, or option; and the conveyance having been made to the defendant, he holds it in trust for the plaintiffs. When the plaintiffs' mortgage was made, the option, just like the term itself, remained in equity the property of the mortgagor. He had an undoubted right to exercise it, and the plaintiffs could not prevent him. He had the right to convert the leasehold into a freehold, without the plaintiffs' consent, the only consequence being that they would be entitled to the conveyance of the freehold as their security, instead of the term with right of renewal. When Thompson assigned his lease and all its stipulations to Smith, the latter acquired the same rights which Thompson had; and when Thompson assigned to the defendant by way of security, the defendant also became, upon default, entitled to exercise the option, just as Thompson or Smith might have done. Indeed, to my mind, it seems too plain to admit of any serious discussion, that where an option to purchase land, or anything else, is mortgaged, neither the mortgagor nor any one claiming under him or by his authority, who exercises the option by completing the purchase, can claim a lien on the property purchased for the purchase money, as against the mortgagee, or can withhold from the mortgagee the legal title so acquired.

I am, therefore, of opinion that the judgment is right, and that the appeal should be dismissed.

The judgment as drawn up merely declares that the

defendant is not entitled to a lien for the purchase money paid by him in priority to the plaintiffs' mortgage, but I think the plaintiffs are also entitled to a conveyance of the legal estate from the defendant if they desire it. The action is not properly framed for foreclosure or sale in the absence of the owner of the equity of redemption, the mortgagor Smith.

Judgment.

MACLENNAN,  
J.A.

Moss, J. A. :—

I think the judgment of the learned Chief Justice should be affirmed, and I am content to rest my conclusion upon the reasons advanced by him and the cases referred to in his reported opinion.

It seems plain that if Thompson—while he continued possessed of the term and lease, subject to the plaintiffs' mortgage—had exercised the right to purchase and procured a conveyance to himself, he would have been held to have acquired the fee for the plaintiffs' benefit. The decree made in the case of *Smith v. Chichester*, 1 C. & L. 486, cited by the present Chief Justice of Canada in delivering the judgment of the Court in *McLean v. Wilkins*, 14 S. C. R., at p. 31, may be referred to in addition to the authorities cited in *Ashburner on Mortgages*, at p. 178.

I am unable to perceive in this case any ground for placing the defendant in a more advantageous position than Thompson, through whom he derived his interest.

The appeal should be dismissed with costs.

BURTON, C. J. O., and OSLER, J. A., concurred.

*Appeal dismissed.*

R. S. C.

## LINDSAY V. WALDBROOK.

*Will—Legacy—Abatement.*

A testator by his will directed that a farm should be sold and that his executors should "first out of the said proceeds set apart the sum of \$2,000, and invest the same in some safe security for the benefit of and for the maintenance and education of" the testator's grandson, subject to certain provisions as to payment of the income and corpus, and he then further directed that "out of the proceeds of the sale of the land there shall be paid the following legacies" to three daughters and a son of the testator :—

*Held*, that the general rule of equality among legatees applied, and that, there not being sufficient to pay all the legacies in full, the grandson's legacy should abate proportionately.

Judgment of ARMOUR, C.J., reversed.

## Statement

THIS was an appeal by the defendants Edna Cryslor and Alice Laura Drake from the judgment of ARMOUR, C.J.

The plaintiffs were the executors of one Robert Waldbrook, and brought the action for the construction of his will. After appointing the plaintiffs his executors and bequeathing some pecuniary legacies, the testator directed his executors to sell certain lands and then proceeded as follows :—

And I further will and direct that the proceeds of the sale of the said lands shall be disposed of as follows :—  
My said executors shall first out of the said proceeds set apart the sum of two thousand dollars and invest the same in some safe security, such as first mortgage upon real estate, for the benefit of and for the maintenance and education of my grandson Robert J Waldbrook, son of my above mentioned deceased son, Robert B. Waldbrook, and during the widowhood of his mother, the said Mary Jane Waldbrook, my said executors shall pay to her the yearly interest on the said two thousand dollars to be by her expended on the said maintenance and education of the said Robert J. Waldbrook, but if the said Mary Jane Waldbrook should marry again, then my said executors shall themselves see to the application of the moneys for the benefit of my said grandson.

And I further will and direct that my said executors shall pay over to my said grandson, Robert J. Waldbrook, the said sum of two thousand dollars on his attaining the age of twenty-one years. Statement.

In the event of the death of my said grandson, Robert J. Waldbrook, before his attaining the age of twenty-one years, then I desire that the interest on the said two thousand dollars be paid to the said Mary Jane Waldbrook, if she is then unmarried, during the period of her natural life, or so long as she shall remain a widow, and upon her marrying or death it is my will that the said two thousand dollars be divided equally share and share alike between my said son, Saybrook Greely Waldbrook, his heirs, executors, administrators and assigns, and daughter, Alice Laura Drake, her heirs, executors, administrators and assigns.

And I further will and direct that out of the proceeds of the sale of the said land there shall be paid the following legacies :—As soon as convenient after the sale my executors shall pay to my daughter, Edna Cryslar, her heirs, executors, administrators and assigns, the sum of one thousand dollars, to my daughter, Catharine Jones, her heirs, executors, administrators and assigns, the sum of six hundred dollars, to my daughter, Alice Laura Drake, her heirs, executors, administrators and assigns, the sum of twenty-seven hundred dollars, to my said son, Saybrook Greely Waldbrook, his heirs, executors, administrators and assigns, the sum of seven hundred dollars.

And in the event of the said last mentioned lands realizing on their sale by my executors more than the sum of seven thousand dollars (this being the sum necessary to provide for the legacies hereinbefore bequeathed), then I will and direct that the said excess over seven thousand dollars be divided and distributed as follows, that is to say :—One-half of the said excess shall be paid to my said son, Saybrook Greely Waldbrook, his heirs, executors, administrators and assigns, one-fourth to my daughter, Edna Cryslar, her heirs, executors, administrators and assigns, and the remaining one-fourth to my daughter,



**Statement.** Alice Laura Drake, her heirs, executors, administrators and assigns.

After providing for the above mentioned devises and bequest and the payment of the above legacies I will and devise that all the rest and residue of my property, moneys and securities for moneys and estate of every nature and kind so ever shall be distributed equally share and share alike between my said daughter, Alice Laura Drake, her heirs, executors, administrators and assigns, and my said son, Saybrook Greely Waldbrook, his heirs, executors, administrators and assigns, and my said executors may convert all my property not consisting of money into money for the purpose of such distribution.

The lands in question were sold and the proceeds were not sufficient to pay the legacies. The testator's grandson, Robert J. Waldbrook, who was an infant, and his mother, Mary Jane Waldbrook, contended that his legacy should not abate, and ARMOUR, C. J., on the 18th of March, 1897 so decided.

From this judgment Edna Crysler and Alice Laura Drake appealed, and the appeal was argued before BURTON, C. J. O., OSLER, and MACLENNAN, JJ. A., on the 28th of September, 1897.

*C. J. Holman*, for the appellants. It is manifest from a perusal of the will that the testator supposed that the lands in question would realize more than enough to pay the legacies in question; and there is nothing on the face of the will that indicates an intention that any of the persons named as legatees shall have priority over the others: *Beeston v. Booth*, 4 Madd. 148. The onus lies on the party seeking priority to make out that such priority was intended by the testator, and the proof of this must be clear and conclusive: *Thwaites v. Foreman*, 1 Coll. 409. It is not sufficient that the words of the will should leave the question in doubt; they must positively and clearly establish that it was the intention of the testator that the

bequests should not stand on an equal footing: *Blower v. Morret*, 2 Ves. Sr. 420; *Miller v. Huddleston*, 3 Mac. & G. 513. The words "in the first place," "in the next place," or "afterwards," used in introducing legacies, create no priority between them: *In re Schweder's Estate*, *Oppenheim v. Schweder*, [1891] 3 Ch. 44; *Haslewood v. Green*, 28 Beav. 1; *Brown v. Brown*, 1 Keen 275; *Clarke v. Sewell*, 3 Atk. 99; *Johnson v. Child*, 4 Ha. 87; *Attorney-General v. Robins*, 2 P. Wms. 23. The legacies to the appellants are to the children of the testator, and where there has been any straining of authority in favour of priority it has been in favour of children: *Lewin v. Lewin*, 2 Ves. Sr. 415. The testator provides that in case there is any excess it shall be divided in a certain way, evidencing very strongly that he did not intend that as to the previous legatees there should be any priority. No special weight can be attached to the provision with reference to the investment of the \$2,000 given to Robert J. Waldbrook, because that merely indicates a way in which that particular legacy is to be dealt with, in view of the infancy of Robert J. Waldbrook, and shews no intention on the part of the testator that in case of a deficiency that legacy should be paid in full.

A. J. Boyd, for the respondent Robert J. Waldbrook. The bequest to this respondent is directed to be set apart and invested in some safe security. This places the gift to him on a different footing from the others and indicates an intention to give priority: *In re Hardy, Wells v. Borwick*, 17 Ch. D. 798. Then this bequest is couched in different terms, and for that reason also it would appear that the testator intended to give it priority. The provision as to the expenditure of the income for the legatee's maintenance is inconsistent with the idea of abatement.

C. W. Colter, for the respondent Mary Jane Waldbrook. It was clearly the intention of the testator that the sum of \$2,000 should be set apart and invested first in some safe security for the benefit of this respondent and her infant son, and that then the whole of the balance should be

**Argument.** treated as a residue to be divided among the other legatees. The case of *Blower v. Morret*, 2 Ves. Sr. 420, is regarded as the foundation of all the subsequent decisions as to abatement in legacies. In deciding this case the Lord Chancellor refers approvingly to his decision, given four days previously, in *Lewin v. Lewin*, 2 Ves. Sr. 414, which must be read in conjunction with *Blower v. Morret*, and must therefore be held to modify and explain it. Though the words "first," "in the first instance," or "in the first place," do not necessarily indicate an intention to give priority, yet *Lewin v. Lewin*, shews that they may have, and in a case like this should have, weight. It is reasonable to infer that the claims of the widow and child of his deceased son, who had apparently no other provision or means of livelihood, were so strong upon the testator, that he provided for them first and caused the provision made for them to be specially set apart. And see *Gyett v. Williams*, 2 J. & H. 429; *Haynes v. Haynes*, 3 D. M. & G. 590.

*Watson*, Q. C., for the respondents, the executors, submitted to the direction of the Court.

*C. J. Holman*, in reply.

November 9th, 1897. BURTON, C. J. O. :—

There is little doubt that the testator gave these legacies on the supposition that the land would sell for more than sufficient to pay them all, and he makes provision that in the event of its realizing more than \$7,000 (that being the sum required to pay the legacies), the excess shall be distributed in a particular manner.

The learned Chief Justice of the Queen's Bench has decided that the legacy now in question is not to abate, but we have unfortunately not been furnished with the reasons for his judgment. There is no doubt some authority for the conclusion at which he arrived to be found in a remark of the late V.-C. Malins, in *In re Hardy, Wells v. Borwick*, 17 Ch. D. 798, in which, at page 805, he said that he quite agreed with the argument that the words "in

the first place," and "in the second place" and so forth, would not have the effect of giving priority, but thought that the direction to invest the money in particular securities shewed an intention to give priority, and he adds: "I can see no distinction between investing in land and investing in any other securities, and therefore the circumstance that it is to be taken out and invested in a particular manner is, in my opinion, an indication of an intention to give priority." He professes to follow the case of *Lewin v. Lewin*, 2 Ves. Sr. 414, although in that case nothing seems to have turned upon the direction to invest, but the intent of the testator seems to have been drawn from the circumstance that he was making a provision for his wife and children, otherwise unprovided for, and that the other legatees were strangers in blood, or collateral relations, or friends, a reason not of much weight at the present day.

Here, however, the infant is not so nearly related to the testator as the other legatees.

*In re Hardy, Wells v. Borwick*, 17 Ch. D. 798, has, however, been departed from by Kekewich, J., in *Cazenove v. Cazenove*, 61 L. T. N. S. 115, and by Chitty, J., in *In re Schweder's Estate, Oppenheim v. Schweder*, [1891] 3 Ch. 44, although the departure did not touch this question of setting apart and investing.

With the exception of the remarks of V.-C. Malins, I find no authority for the view that the direction to invest a sum for the payment of a legacy makes any difference.

I lean to the argument that the direction to invest is merely machinery, and did not affect the meaning of the will. The sum so directed to be invested is still a legacy, and in the absence of clear intention to the contrary it must be presumed that the testator intended that all the legatees should be equally paid, a presumption not to be repelled by ambiguous expressions.

I have said that I have been unable to find any case in which the direction to invest has been held to be an indication of an intent to give priority, and I am not overlook-

Judgment.

BURTON,  
C.J.O.

Judgment.

BURTON,  
C.J.O.

ing the case of *Gyett v. Williams*, 2 J. & H. 429. There the direction was that the sum of £2,000 was to be laid out in purchasing an estate, and then after disposing of that estate, the testator directs that the residue of his personal estate is to be invested and apportioned out in a particular way. There nothing passed by the subsequent direction, except the residue, to be invested after the purchase of the estate.

The substance of the gift, it was there said, is such, that the language cannot be regarded as pointing to the mere order of enumeration, but must be read as giving priority. The onus, it was admitted in that case, was on those who claimed priority, but it was held to be satisfied.

On the other hand, in *Thwaites v. Foreman*, 1 Coll. 409, the direction was in the first place to pay a debt, then to set apart an annuity fund, and in the next place, after making such investment as aforesaid, to pay legacies, and it was held that the words did not shew an intention to give priority, but merely indicated the order in which, as a matter of arrangement, the different subjects were dealt with. The words were read not as pointing out the order of execution of the trusts but the order of enumeration only.

In the present case I think the claimant has failed to satisfy the onus that was upon him to make out that such priority was intended by the testator. As is said in one case: "Unless the testator tells you himself that he believes his assets to be insufficient you must attribute to him the notion that he has assets sufficient to satisfy all legacies that he makes, and if you attribute that notion to him you cannot well infer that he intended to make provision for an order of payment applicable only to the case of the assets being insufficient."

I am of opinion, therefore, with great respect, that the appeal must be allowed, and an order made for an abatement of all the legacies payable from the proceeds of the land sold, and that the appellants should have their costs here and below.

OSLER, J. A. :—

Judgment.

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OSLER,  
J. A.

There are here five legacies payable out of a specific fund, consisting of the proceeds of the sale of one of the testator's farms, and the question is, the fund having turned out to be insufficient to pay them all in full, whether the first, which is that given to the testator's grandson, has priority over the others, or whether all should abate in proportion.

On the face of this will I am unable to find anything which sufficiently indicates an intention on the part of the testator to place one legatee in a better position than the others.

It is well settled that the use of words directing a legacy to be paid "immediately," or "in the first place," or "out of the first moneys, etc.," or within a brief specified time after the testator's decease, is no evidence of an intention to give priority. The general rule is stated in many cases from Lord Hardwicke's time onwards, and may be quoted from Lord Justice Knight-Bruce's language in *Thwaites v. Foreman*, 1 Coll. 409: "*Prima facie* all bequests stand on an equal footing, and it lies upon those who assert the contrary to prove it. It is not sufficient that the words of the will should leave the question in doubt. They must positively and clearly establish that it was the intention of the testator that the bequests should not stand on an equal footing. Now, in considering whether such was the intention of the testator, we must recollect that words that are merely introductory cannot, generally, by themselves be held to direct any order of payment." Then he quotes a passage which he attributes to Sir John Leach in *Beeston v. Booth*, 4 Madd. 161, but which is taken from the judgment of Lord Hardwicke in *Blower v. Morret*, 2 Ves. Sr. 420, and has been frequently repeated, namely, "Unless the testator tells you himself that he believes his assets to be insufficient you must attribute to him the notion that he has assets sufficient to satisfy all the bequests that he makes, and, if you attribute that notion to him, you cannot

Judgment.

OSLER,  
J.A.

well infer that he intended to make provision for an order of payment applicable only to the case of the assets being insufficient." In *Thwaites v. Foreman*, 1 Coll 409, the testator directed his trustees to stand possessed of the residue of his estate upon trust, in the *first place* to pay what might be due upon his covenant to J. B., and *then to set apart and invest* a sufficient sum to satisfy certain annuities bequeathed by his will, and *in the next place*, after making such investment, upon trust to pay the legacies bequeathed by the will. The assets were insufficient to pay the legacies and annuities in full and it was held that the annuities had no priority over the legacies.

In the present case the testator expressly contemplates the fund indicated as the source of payment of the legacies as being sufficient for the purpose, and there is no reason suggested in the will why the grandson, and son, and daughters, all of whom are equally subjects of the testator's bounty, should not all stand on the same footing. It was argued that the direction to invest the grandson's legacy made a difference; indicating an intention that it should have priority over the others, and I am informed that the judgment below proceeded upon the ground that this intention ought to be inferred, that the investment was directed to be made of a sum which the testator probably thought would be sufficient to produce a fund sufficient for the maintenance and education of the infant. I regret not to be able to adopt this view. I see nothing in the will which entitles me to say that the testator contemplated any particular sum as necessary or sufficient for maintenance. There is simply the gift with a direction which seems naturally to follow where the legacy is not payable until majority, and the income is to be applied towards maintenance and education during minority. The case appears to me quite different from that of *Gyett v. Williams*, 2 J. & H. 429, where the direction was to invest £2,000, part of the proceeds of the testator's estate, in the purchase of an estate to be held in trust for the legatee; followed by a disposition of *the residue*. Here the bequests to the son and daughters, except where

the testator comes to deal with a possible surplus after payment of the five legacies, are not given as out of the residue of the fund produced by the sale, but simply out of the fund, and, apart from the direction to invest, in the same manner as the legacy to the grandson. As between these legacies and any others given by the will, these five no doubt have priority, but as between themselves it appears to me, with all respect, that the authorities require us to hold that in a deficiency of the fund, they abate.

I refer to *Roche v. Harding*, 7 Ir. Ch. 338 (1858); *Lewin v. Lewin*, 2 Ves. Sr. 414; *Lord Dunboyne v. Brander*, 18 Beav. 313; *Haynes v. Haynes*, 3 D. M. & G. 594; *In re Hardy, Wells v. Borwick*, 17 Ch. D. 798 (which is disapproved of and not followed in *Cazenove v. Cazenove*, 61 L. T. N. S. 115, and *In re Schweder's Estate, Oppenheim v. Schweder*, [1891] 3 Ch. 44, and "must be considered overruled:" Theobald on Wills, 4th ed., p. 660); *Page v. Leapingwell*, 18 Ves. 463; *In re Tunno, Raikes v. Raikes*, 45 Ch. D. 66.

Judgment.  
OSLER,  
J.A.

MACLENNAN, J. A. :—

With great respect I think this appeal ought to be allowed, and that it should be declared that the \$2,000 legacy for the benefit of the testator's grandson is subject to abatement equally with the other legacies payable out of the proceeds of the sale of the farm. The authorities are uniform that it requires very clear language to rebut the presumption that all legacies are intended to be paid in full, and that consequently when the estate is not sufficient for that purpose all must bear a proportionate part of the deficiency. In *Blower v. Morret*, 2 Ves. Sr. 420, Lord Hardwicke said it required "very strong words" to exempt one legacy from abatement with the others upon a deficiency of assets. That is the leading case, followed by a long string of other cases which were cited to us, and in which it has been followed with one single exception. That exception is *In re Hardy, Wells v. Borwick*, 17 Ch. D. 798, which,



**Judgment.** however, has been twice disapproved of in later decisions.

**MACLENNAN,  
J.A.**

To my apprehension, there is nothing whatever in this will giving priority to this \$2,000 legacy over the others. The land is directed to be sold, and then the testator directs that the proceeds shall be disposed of as follows: [The learned Judge read the clauses and continued:] He makes no provision whatever for the case of a deficiency. Reliance was placed, in favour of the priority of the \$2,000 legacy, on the words "first out of the said proceeds," as indicating an intention to give such priority. The fact that the testator thought the land would produce \$7,000 at least, and perhaps more, shews that he did not use those words with any such intention, and the words used with reference to the other legacies; in my opinion, leave no room for argument. The \$2,000 legacy was to be paid out of the proceeds, but the other legacies were also to be paid out of the proceeds, not after the payment of the \$2,000, but "as soon as convenient after the sale." It was argued that the proceeds out of which the legacies to his son and daughters were to be paid were the proceeds after setting apart the legacy to the grandson; but that is not the language used, and, on the contrary, all are equally to be paid "out of the proceeds of the sale of the land."

The appeal must, therefore, be allowed.

*Appeal allowed.*

R. S. C.

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## BUTCHART V. DOYLE.

*Landlord and Tenant—Way—Mode of User.*

The defendant leased to the plaintiff a small knoll or island, standing in a shallow lake, which in the dry season became a muddy marsh. The land surrounding the knoll or island belonged to the defendant and the lease provided that the plaintiff should have a right of way across it, nothing being said as to the mode of exercising the right. The plaintiff built a trestle bridge from the knoll or island to the main land and this bridge the defendant pulled down :—

*Held*, that the plaintiff's mode of user was reasonable and that the defendant was not justified in interfering with the bridge.

Judgment of MEREDITH, J., reversed.

THIS was an appeal by the plaintiff from the judgment of MEREDITH, J. Statement.

The plaintiff was lessee from the defendant of land belonging to the defendant, with a right of way, and the question was whether, under the circumstances stated in the judgment, there had been a reasonable user of the right of way and an unreasonable interference with it.

The action was tried at Owen Sound on the 24th of November, 1896, before MEREDITH, J., who dismissed it without costs.

The appeal was argued before BURTON, C. J. O., OSLER, and MACLENNAN, JJ. A., on the 29th and 30th of September, 1897.

*Watson, Q.C.*, and *Kilbourn*, for the appellant.

*Aylesworth, Q.C.*, for the respondent.

November 9th, 1897. The judgment of the Court was delivered by

MACLENNAN, J. A. :—

I am of opinion that this appeal should be allowed.

The lease containing the right of way was made in August, 1889, for thirty years, and was of an island on which was erected a dwelling-house, and the way was to

Judgment.

MACLENNAN,  
J.A.

enable the plaintiff and his family to communicate with the shore, over land which during part of the year was covered with water, and at other times was, for the most part, mud and marl. The lease does not define the way but simply says the plaintiff is to have right of way to and through the shallow lake property owned by the lessor, including the land owned by the North America Chemical and Mining Company, and through said lands to the public highway. Soon afterwards the plaintiff built a plank footway, upon trestles, in a straight line towards the highway, raised high enough to be dry and convenient, and fairly level; and the surface of the soil beneath being uneven, the footway was in some places much higher above the ground than at others.

The line over which the road was built is not now objected to, and the learned Judge finds, and properly finds, upon the evidence, that the bridge was built without objection on the part of the defendant, and has even been used by the defendant himself to pass over to another island lying between the shore and that leased to the plaintiff.

In a lease signed by the defendant to the mining company after the bridge was built it is referred to, and while the defendant assumes to authorize the company to remove any portion of it to enable the company to cross the land over which it stands for the purposes of their business, and to make roads and lay rails thereon, the lessees were required to make any changes in the bridge so as to permit of the same facilities for passing and repassing as before.

The defendant's complaint now is, that at a certain point the bridge is not high enough to allow a waggon loaded with hay to pass under it, with the driver upon the load. What happened was that on the 21st of July, 1896, the defendant pulled down a section of the bridge, on the pretence that it was necessary to do so to pass with a load of hay. What the learned Judge says about that is that he finds without doubt that the load of hay was unnecessarily

taken to the place for the purpose of bringing the matter in dispute to a crisis, for the purpose of forcing a way through at the point in question. Judgment.  
MAULEHAN,  
J.A.

It seems that the defendant was in some anxiety lest by lapse of time the plaintiff would acquire title to the land itself over which the bridge was built, and there was correspondence about it, and the plaintiff, while disclaiming any desire to acquire any such right, was willing to have the lease amended by inserting a provision satisfactory to the defendant, and even agreed to accept and execute a new lease. This was satisfactory to the defendant, and he agreed to have a new lease prepared. That was in 1894, and is all manifested by three letters which then passed between them, and they do not contain a word of complaint or objection on the part of the defendant to the bridge itself or to its height or mode of construction. Unfortunately, no new lease was prepared or signed, and the next thing that happened was a letter from the defendant's solicitors to the plaintiff on the 10th January, 1896, threatening that if a lease was not produced for his signature within a month, the tramway, that is, the bridge, would be taken down. This was an unfortunate letter, inasmuch as the plaintiff had agreed to take a new lease, and the defendant had said he would have it prepared, and as it was for his protection it was more proper that the defendant should do so. The pulling down of the bridge in July was the fulfilment of the threat.

Now, if the defendant had, after breaking down the bridge, immediately restored it or had offered or proposed to do so, even if he proposed to raise it high enough for a load of hay, it would not be a case calling very loudly for the assistance of the Court, by way of the extraordinary remedy of injunction. But that is not what the defendant did; he pulled it down deliberately, in exercise of what he conceived to be a right, and without the intention of restoring it, and in his defence he insists on his right to do what he did. That being so, the plaintiff acted reasonably in bringing his action. If he had rebuilt it, he had the

**Judgment.** best reason for expecting that it would be pulled down again; and as it was a structure in daily use for himself and his family he was not obliged to abstain from coming to the Court because a few dollars would have sufficed to rebuild it.

**MAULENNAN,**  
**J.A.**

I am of opinion that the defendant was entirely in the wrong, and that the appeal should be allowed, and that there should be judgment for the plaintiff for an injunction restraining the defendant from injuring or destroying the bridge, and from interfering with the plaintiff in maintaining it.

The defendant must pay the costs of the appeal, and of the action.

R. S. C.

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### BOULTON V. LANGMUIR.

*Bills of Exchange and Promissory Notes—Demand Note—Alteration of Date—Limitation of Actions—Absence Beyond the Seas—Return from Beyond the Seas.*

The changing by the payee of the date of a demand note, payable with interest, to a later date, is a material alteration and makes it void, though the effect of the alteration may be to benefit the maker by reducing the amount of interest chargeable against him.

Judgment of FALCONBRIDGE, J., affirmed.

The expression "beyond the seas" in 4 & 5 Anne ch. 3, sec. 19, is not to be construed literally, but means, when applied to a defendant sued in this Province, "out of the Province of Ontario."

To make the statute run in the defendant's favour, his return from beyond the seas must be open and of sufficiently long duration to have enabled the creditor, if he had known of it, to bring an action, though the creditor's knowledge is not essential.

THIS was an appeal by the plaintiff from the judgment of FALCONBRIDGE, J., at the trial.

The action was brought on the 1st of June, 1896, by the payee against the maker of a promissory note purporting to be dated the 25th of January, 1888, payable on demand with interest at six per centum per annum. In the statement of claim the nature of the consideration for the note,

viz., money lent, was referred to, but there was no claim for payment in that respect. In the defence there was a general denial of the plaintiff's claim, and the Statute of Limitations was pleaded. The defendant, who resided out of the Province, disputed the jurisdiction, and the action was allowed to proceed subject to his objection. Statement.

The action was tried at Toronto on the 29th of October, 1896. It was proved that the note had been signed by the defendant in New York, where he was residing, and had been sent by him in a letter to the plaintiff, in Toronto, about the end of June, 1886, and had been dated back to the 25th of January, 1886, to make it correspond with an acknowledgment of indebtedness of that date previously sent by the defendant to the plaintiff. It was also proved that the note had never been out of the plaintiff's possession, and that while in his possession the date had been altered to the 25th of January, 1888. FALCONBRIDGE, J., allowed the defendant to amend by setting up the alteration as an avoidance of the note, and on this ground dismissed the action, not dealing with the question of jurisdiction or with the defence of the Statute of Limitations. The plaintiff did not, at the trial, ask for judgment on the consideration, but on the contrary disclaimed having sued on that cause of action. Subsequently, however, he applied for leave to proceed upon the consideration, but this application was refused.

The evidence bearing upon the defence of the Statute of Limitations was, shortly, that the defendant had always, since the making of the note, resided out of the Province of Ontario, and that he had been in Toronto in February, 1893, and had then visited the plaintiff. The defendant was not present at the trial, but a letter was produced on his behalf, written by the plaintiff to him on the 26th of February, 1888, in which the plaintiff said: "No doubt it will be a surprise for you to hear from me. We are up to our neck in trouble over this ranch business as I explained to you when here. We have had another law suit since

**Statement.** you were here, and lost the case," and he then proceeded to go into details. In reference to this letter the plaintiff was asked: "Langmuir had evidently been here, had he not?" And he answered, "It is likely," no further explanation being given.

The appeal was argued before BURTON, C. J. O., OSLEB, and MACLENNAN, JJ. A., on the 4th of October, 1897.

*McCarthy, Q. C., and John McGregor*, for the appellant. The alteration is immaterial, the note being payable on demand: *Aldous v. Cornwell*, L. R. 3 Q. B. 573; *Suffell v. Bank of England*, 7 Q. B. D. 270. That case was reversed: 9 Q. B. D. 555, but the reversal was on special grounds, and the general principles were not disapproved. The note here bears interest, and probably a demand would be necessary to make the right to payment arise: Byles, 15th ed., p. 281, and cases there cited, but even apart from this the date is immaterial. *Hirschman v. Budd*, L. R. 8 Exch. 171, points the distinction. At all events, if the note is bad, the plaintiff is entitled to sue upon the original consideration, which is set out in the statement of claim, and the Statute of Limitations is no defence. The defendant was continuously out of the jurisdiction, and the statute does not apply. He never "returned" within the meaning of 4 & 5 Anne ch. 3, sec. 19, which governs the case. The evidence relied on as to the defendant being here is vague and unreliable. At any rate a mere visit here would not be enough: *Gregory v. Hurrill*, 1 Bing. 324; 8 Moore 189; Banning's Statute of Limitations, 2nd ed., p. 92.

*Aylesworth, Q. C., and E. B. Brown*, for the respondent. The alteration was deliberately made by the plaintiff and avoids the note. The Bills of Exchange Act, 53 Vict. ch. 33, sec. 63 (D.) applies, and alteration of date is specifically made material. This is, however, going no further than the former law. A demand note runs from its date: Darby and Bosanquet's Statutes of Limitations,

2nd ed., p. 30, and, therefore, an alteration of date is vital. **Argument.** It is too late now for the plaintiff to try to sue on the original consideration, and, at any rate, the Statute of Limitations is a defence. R. S. O. ch. 60, sec. 5, does not apply to an action upon a note, and the exception as to absence from Ontario does not help the plaintiff. The only other statute with such exception is 4 & 5 Anne ch. 3, sec. 19, and this also is limited to specific actions, not including *assumpsit* or *indebitatus assumpsit*. Moreover, the expression is "beyond the seas," and this does not touch the case of residence in the State of New York, which adjoins the Province of Ontario. But if the statute is applicable at all, there has been a return, and the onus is on the plaintiff to shew the insufficiency of the return. *Gregory v. Hurryll*, came up twice, and on the second occasion the earlier decision was dissented from: see 5 B. & C. 341; 8 D. & R. 270. The later decision is adopted by Darby and Bosanquet, 2nd ed., p. 58; though Banning adopts the other view, citing the earlier decision, and taking no notice of the later one. It is impossible to fix any limit as to the duration of the return.

*McCarthy*, Q. C., in reply. "Beyond the seas," means "out of the realm": *Ruckmaboys v. Lulloobhoy*, 5 Moo. Ind. Ap. 234, 8 Moo. P. C. 4. The language as to absence is the same as to a plaintiff, and the same construction should be adopted: *Pardo v. Bingham*, L. R. 4 Ch. 735.

November 9th, 1897. The judgment of the Court was delivered by

OSLER, J. A. :—

Upon this appeal the questions are :—

1. Whether the plaintiff's remedy upon the note, or the consideration, or both, is barred by the Statute of Limitations.
2. Whether the alteration of the date of the note is a material alteration, which avoids the instrument in the hands of the payee.



Judgment.

OSLER,  
J.A.

The plaintiff's remedy upon the note is clearly barred by the Statute of Limitations, 21 Jac. I. ch. 16, sec. 3, unless saved by the exceptive provision of 4 & 5 Anne ch. 3, sec. 19, which provides that actions against persons beyond the seas may be brought at any time within six years after their return. A promissory note payable on demand is at maturity as soon as the note is made and delivered to the payee, and the mere circumstance of its being payable with interest makes no difference in this respect: *In re George*, 44 Ch. D. 627; *Edwards v. Walters*, [1896] 2 Ch. 157, 166. It may sometimes serve to excuse prompt presentation: *Chartered Mercantile Bank of India v. Dickson*, L. R. 3 P. C. 574, but is otherwise of no importance.

In the case of a plaintiff, "residence without the limits of Ontario," is no longer a disability: 25 Vict. ch. 20: 42 Vict. ch. 16, sec. 1 (O.). The latter Act was passed, it would seem, because of the omission to consolidate the former in the statutory revision of 1877.

The defendant's "absence beyond the seas," at the time the cause of action accrued, within the meaning of the statute of Anne, as applied to the British Dominions, may still be availed of by the plaintiff as an excuse for not bringing the action until his "return from beyond the seas." The expression "beyond the seas" in 4 & 5 Anne ch. 3, sec. 19, must, of course, receive the construction which was given to it as applied to a plaintiff, in the principal Act, 21 Jac. I. ch. 16, sec. 7, viz., that it is synonymous in legal import with the phrase "out of the Province of Upper Canada," or "Ontario." So it was construed in the case of *Forsyth v. Hall*, [1830] Draper's Rep. 304, and so also by the Privy Council many years afterwards in *Ruckmaboye v. Lulloobhoy*, [1852] 8 Moo. P. C. 4, an East Indian appeal, where it was held to be synonymous with "out of the realm," "out of the land," or "out of the territories," and was not to be construed literally.

A similar construction was placed upon it by the Supreme Court of the United States in *Murray's Lessee v. Baker*,

3 Wheat. 541 (1818); *Bank of Alexandria v. Dyer*, 14 Peters 141 (1840), and other cases : Angell on Limitations 6th ed., sec. 200.

Judgment.

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OSLER,  
J.A.

The defendant was residing in the United States when he gave the plaintiff the note in question, and when the account was rendered for the money lent, which constituted its consideration. The question, therefore, is whether he returned "from beyond seas," i.e., came into this Province, at any time afterwards and so long before action as to bring the statute into operation. This point was not disposed of at the trial, as the learned Judge turned the case upon the alteration of the note, and held that the action was not brought upon the consideration. As to this, I think he was right, but as the plaintiff now insists that he should be allowed to recover upon the consideration, the defence of the statute must be considered, as, if not barred, he may do so, though he may fail upon the note.

It may be inferred from the plaintiff's letter of the 26th of February, 1888, and his evidence, that the defendant had been in Ontario shortly before it was written, while the plaintiff was the holder of the note, and that the parties had had a business interview on the subject of their affairs; but the plaintiff contends that there is no evidence of a return sufficient to set the statute running.

As regards the plaintiff's disability, the rule was clear, that whenever he came within the jurisdiction the Statute of Limitations began to run, and he could not urge as an excuse that he did not remain long enough to sue: *Torrance v. Privat*, 9 U. C. R. 570. Whether the rule is applied against him so rigidly when the case is that of the defendant coming within the jurisdiction, is not so clear. In the case just cited, Sir John Robinson observes that in applying the exception introduced by the statute of Anne very different considerations arise, "because it is to little purpose to shew that a defendant has been within the jurisdiction within the six years, unless he has been openly so, and for such a time as that the plaintiff, by any reasonable diligence, could have learned the fact and availed

Judgment.

OSLER,  
J.A.

himself of it." In Darby and Bosanquet's Statutes of Limitations, 2nd ed., [1893] p. 58, it is said: "If a defendant, who is beyond seas when the cause of action arises, returns to England for ever so short a time, even without the plaintiff's knowledge, the time begins to run." For this *Gregory v. Hurrill*, Q. B. [1826] 5 B. & C. 341; 8 D. & R. 270, is cited.

In Chitty on Contracts, 12th ed. [1890], p. 799, the same authority is cited for the proposition in the text: "But if the debtor once return to this country, though his stay here be but for a few days, and the fact of his return was unknown to the creditor, the action must be brought within six years from the time of such return."

Leake on Contracts, 3rd ed. [1892], p. 847, is to the same effect: see also Selwyn's N. P., 12th ed., p. 164.

In Leigh's N. P. [1838], p. 1247, it is said: "But if the defendant, having arrived in this country, stops a few days, so that the plaintiff would have time to serve him with a writ before his departure, the statute begins to run from the time of his arrival, though his return was unknown to the plaintiff," citing the same case.

On the other hand, in Banning's Statute of Limitations, 2nd ed. [1892], p. 92, it is said: "A return must be more or less of a permanent nature, and mere entry within British jurisdiction for a temporary purpose, for instance, by touching in a vessel at Deal, may not be a return within the Act." For this the writer cites *Gregory v. Hurrill*, C. P. [1823] 1 Bing. 324; 8 Moore 189. The apparent discrepancy between the decision of the Q. B. and that of the C. P. has not been commented on in any of the books, but a careful perusal of them shews that there is no real conflict on this point. Both cases arise out of proceedings taken by the plaintiff Gregory, by petition to the Chancellor, to quash a commission of bankruptcy which had been issued against him, under which Hurrill had been appointed his assignee. The question was, whether in February, 1821, when the action against Gregory was commenced out of which the commission

of bankruptcy arose, there was a good petitioning creditor's debt to support the commission. This depended upon whether certain former proceedings against Gregory in the year 1812 were regular and sufficient to save the Statute of Limitations, and if not, then whether the return of Gregory to England in 1814, he having always until then been abroad from the time when the cause of action accrued in 1811, was such a return as was contemplated by the statute.

Judgment

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 OAKES,  
J.A.

An action of trover was directed to be brought by Gregory against Hurrill, in the Common Pleas, in which the action of 1812 and the subsequent proceedings therein were proved, and as to Gregory's return in 1814 evidence was given that in the month of April of that year he had called at the office of the Vice-Consul of Sweden, at Deal, several times, while waiting in the Downs for passage in the ship Hazard. He left a letter with the witness to be delivered to the captain of a ship called the Aurora, and he waited there several days.

In that action a rule was made absolute to enter a verdict for the defendant on the ground that the proceedings in the former action were sufficient to save the statute: *Gregory v. Hurrill* (1822) 3 B. & B. 212; 6 Moore 525.

The Chancellor thought the matter of sufficient importance to undergo a second consideration, and sent a case for the opinion of the Court of Common Pleas on the same facts. The arguments are very fully reported in 1 Bing., and 8 Moore; but the only note of the judgment is that the Court certified that the petitioning creditor's debt was a valid legal debt to support the commission and was not barred by the statute.

The Court, not improbably, followed their decision of the previous year, and if they did so, it was unnecessary for them to pronounce any opinion upon the effect of Gregory's return in 1814.

Gregory, being still dissatisfied, presented another petition against the commission, stating that notwithstanding the opinion of the Judges of the Common Pleas he was advised that the debt of the petitioning creditor was really

Judgment.OSLER,  
J.A.

and actually barred by the Statute of Limitations, and the Chancellor thereupon ordered another case to be stated, this time for the opinion of the Court of Queen's Bench, upon the same facts as before. The arguments in this case are reported in 5 B. & C. and 8 D. & R., and the result was that the Court certified to the Chancellor that the petitioning creditors had not a valid debt to support the commission. To reach this conclusion both points must have been decided adversely to the assignee, namely, that the proceedings in the former action did not save the statute, and that Gregory's return in 1814, though actually unknown to his creditor, was a return sufficient to set it running.

In *Johnson v. Buchanan*, 1 U. C. R. 171, where the debtor "had been in this Province for two or three days and the plaintiff had transacted business with him, being then in a condition to have brought this action," the Court expressed the opinion that there was evidence on which the jury ought to have found for defendant on the point of the sufficiency of his return to set the statute running.

*Gregory v. Hurrill* actually decides nothing more than that it is not necessary that the creditor should know of the debtor's return; the debtor having been in England long enough for him to have brought his action if he had known of it. A mere accidental touching on provincial ground, a passing through it in the course of a short railway journey, cannot in any reasonable sense be regarded as a return, where, had the creditor known of it, the utmost diligence would not have enabled him to avail himself of it by bringing an action. But, be his stay long or short, if it be long enough for the creditor to have sued the debtor had he been aware of it, and if it be not clandestine and with a mere intent to defraud the creditor, the statute begins to run: Angell on Limitations, 6th ed., sec. 206; *Fowler v. Hunt*, 10 Johns. N. Y. 464; *Randall v. Wilkins*, 4 Denio 577.

In this case, the evidence of the defendant's return is extremely meagre. For all that appears he may have

been in Canada no more than a few hours, and then at a time when the offices may not have been open, so that with the best diligence the plaintiff, knowing of his return, could not have sued. At the trial the decision turned wholly on the alteration of the note, and, although the defendant's counsel may have been alive to the other point, I do not see that it was a subject of discussion. The onus of proving the return lay upon the defendant, and though no doubt a *prima facie* case is made out I cannot think that the brief allusion in the letter of the 26th of February, 1888, is entirely satisfactory.

Judgment.

OSLER,  
J.A.

As to the alteration of the note I am clearly of opinion that the judgment in the defendant's favour at the trial was right. I regard the Bills of Exchange Act [53 Vict. ch. 33, sec. 63 (D.)] as merely declaratory of the law on this point: *Vance v. Lowther*, 1 Ex. D. 176. To alter the date of the note was to make it appear to be a different contract from that which the defendant had entered into, both as regards the date at which it became an existing contract, and the time from which it bore interest. I do not see that the fact of its being thereby made in one respect more favourable to the defendant affects the question of the materiality of the alteration. It is the change in the contract, not the surrounding circumstances, which the law regards.

On the whole, I think it would be reasonable to give the plaintiff a new trial in order that he may have an opportunity of recovering on the consideration for the note. The defence of the Statute of Limitations can then be more fully gone into. But this indulgence can only be granted on payment by the plaintiff of the costs of the last trial and of this appeal.

*New trial on terms.*

R. S. C.

## HALWELL V. TOWNSHIP OF WILMOT.

*Bankruptcy and Insolvency—Assignments and Preferences—Preference—Breach of Trust—Revocation of Transfer—Post Office Act—R. S. C. ch. 35, sec. 43.*

The transfer by the defaulting treasurer of a municipality to the bankers of the municipality of the accepted cheque of a third person for the amount due by him to the municipality cannot be impeached under the Assignments and Preferences Act, the duty to make good his wrong being sufficient to protect the transaction.

Judgment of FERGUSON, J., affirmed.

The cheque was sent by the treasurer by post in a letter to the bankers and this letter was received by the bankers in the afternoon, but the amount was not credited in the bank books to the municipality till next morning, and before this was done an assignment for the benefit of creditors had been made by the treasurer :—

*Held*, that the property passed as soon as the cheque reached the bankers and that the assignment was not a revocation of the transfer.

*Per* FERGUSON, J.—The property in the cheque passed irrevocably by virtue of the provisions of the Post Office Act, R. S. C. ch. 35, sec. 43, as soon as the letter was posted.

Judgment of FERGUSON, J., affirmed on other grounds.

**Statement.** THIS was an appeal by the plaintiff from the judgment of FERGUSON, J.

The action was tried before him at Stratford on the 11th of November, 1896, and on the 5th of January, 1897, the following judgment, in which the facts are stated, was given in the defendants' favour :—

FERGUSON, J. :—

The plaintiff brings the action as assignee (under the statute) of the estate and effects of Alfred Kaufman against the corporation of the township of Wilmot and the Canadian Bank of Commerce, claiming a declaration that a certain cheque for the sum of \$3,400 received by Kaufman on the 27th day of February, 1896, from the solicitor of one Irwin, to whom Kaufman had executed and given a chattel mortgage, was the property of the plaintiff as such assignee, and that the moneys deposited in the Canadian Bank of Commerce at the city of London, being the amount or proceeds of the said cheque were and still are the property of the plaintiff as such assignee.

It will, I think, not be necessary to refer to the pleadings at any length, for the case comes before me upon written admissions signed by counsel in lieu of evidence, which admissions seem to embrace the whole case.

The defendants, the Canadian Bank of Commerce, say that they have no interest in the moneys in question except as bailees of the same. They seem to be mere stakeholders.

They submit their rights to the protection of the Court, and say that they are willing to abide by any order that may be made.

The admissions are of considerable length and are as follows:—

1. That Alfred Kaufman was insolvent prior to the 24th day of February, 1896.

2. That Kaufman was indebted to Cargill & Son in \$1,550, and some time early in February, 1896, they commenced an action in the High Court of Justice and caused a writ of summons to be served on Kaufman, and judgment was entered under Rule 739, and execution to the sheriff of the county of Waterloo was issued on the 26th day of February, 1896.

3. The said sheriff on the 27th day of February, 1896, about 3.30 p.m., seized goods of said Kaufman who resides at Baden in the said county of Waterloo.

4. On the 24th day of February, Kaufman through Messrs. Turnbull & Barrie of Galt arranged with Irwin of Galt to lend \$3,400 on a chattel mortgage with the note of one James Livingston for a like amount as collateral, both payable one month after date, and Irwin on the 25th day of February gave his cheque for \$3,400 to said Turnbull & Barrie.

5. On the 27th day of February, 1896, Turnbull & Barrie mailed their cheque in favour of Alfred Kaufman or order on the Bank of Commerce, Galt (accepted that day by said bank), for \$3,400 to said Kaufman. The letter could not have been received by him until after the said seizure by the sheriff.

Judgment.

FERGUSON,  
J.



Judgment.

FERGUSON,  
J.

6. On the evening of the 27th of February or morning of the 28th of February, Kaufman endorsed Turnbull & Barrie's cheque, and mailed it to D. B. Dewar, manager Canadian Bank of Commerce at London, which letter was received by said Dewar shortly after 3 p.m. (after bank hours) on the 28th day of February, and next morning, the 29th of February, the amount was placed to the credit of the "township of Wilmot, A. Kaufman, treasurer," in the books of the said bank.

All moneys drawn from this account have been drawn on cheques signed by Kaufman only as treasurer. Of this, \$2,950 is still in the bank's hands to credit of that account.

7. Kaufman was treasurer of the township of Wilmot, having been appointed such in 1881. He had for several years used moneys of the township in his hands as his own. Kaufman's accounts were audited yearly. In February, 1895, auditors' report found about \$6,900 in Kaufman's hands. This report was read by the council which passed a resolution adopting it. On February 6th, 1896, auditors made report finding \$4,157.65 in Kaufman's hands on 31st December, 1895, and about \$3,470 in his hands on the 6th February, 1896. This last report was presented to township council at its meeting on the 17th day of February, 1896, which passed a resolution adopting it. No demand was made by council or any officer of the township of Wilmot on Kaufman, and no officer or councillor of the township knew of deposit until after assignment, or knew that Kaufman was unable to pay amount shewn due by report until after the 29th of February, 1896. Said Livingston was one of the sureties of Kaufman.

The money shewn by auditors' report as in Kaufman's hands on the 6th February, 1896, had before that been used by him for his private purposes.

8. Kaufman made an assignment to plaintiff under R. S. O. ch. 124, which assignment was made, executed and accepted on the evening of the 28th of February, about 9 o'clock, and registered on the 29th of February.

9. The money was borrowed from Irwin by Kaufman

for the purpose of paying the amount of his deficiency to the township.

Judgment.

FERGUSON,  
J.

In the foregoing I have adhered to the words of the admissions. In some instances these may not appear entirely grammatical.

The chattel mortgage given by Kaufman to Irwin is not attacked by the plaintiff, and so far as this portion of the transaction is concerned, the case stands just as if Kaufman, by some means lawful in themselves, had obtained the cheque of Turnbull & Barrie, marked good by the bank, for the purpose of making good the deficiency of the money in his hands as treasurer of the township, which deficiency arose by his (Kaufman's) appropriating moneys belonging to the township in his hands as the treasurer and held by him under the provisions of the statute, to his own use.

So far as the writ of execution in favour of Cargill & Son may have concern, if it is of importance, it did not, as I think, attach upon this cheque.

The writ was in the hands of the sheriff to be executed at a time when this cheque was in Kaufman's possession, and if the cheque had been in the position in this regard of ordinary goods and chattels the writ would have probably attached and constituted a charge upon it, but being a cheque, money or security for money, the writ would not attach upon it till seizure of it by the sheriff, and it was not seized by him: see the law as stated in the case *McDowell v. McDowell*, 1 Ch. Ch., at pp. 142, 143, by the late Chancellor Vankoughnet. I have not seen that the law, as to this particular point, has since been changed.

The cheque was mailed (put into the post office) by Kaufman on the evening of the 27th or morning of the 28th of February. The assignment to the plaintiff was made on the evening of the 28th of February, about 9 o'clock.

The 4th section of R. S. O. ch. 124, states what shall pass to the assignee by the assignment, namely, all the real and personal estate, etc., belonging at the time of the assign-

**Judgment.** ment to the assignor, except, etc. Section 43 of R. S. C.  
**FERGUSON,** ch. 35, provides that "from the time any letter, packet,  
**J.** chattel, money or thing is deposited in the post office for the purpose of being sent by post, it shall cease to be the property of the sender."

The cheque was deposited in the post office by Kaufman for the purpose of being sent by post, at latest, on the morning of the 28th of February. The assignment was not made till the evening of the same day about 9 o'clock, and if the question were considered as resting upon these simple facts and the statutory provisions I have referred to, the conclusion would be that the cheque could not have passed to the plaintiff by virtue of the assignment, because it was not property belonging to Kaufman at the time of the assignment to the plaintiff.

It was, however, contended that the cheque, though endorsed by Kaufman and deposited in the post office as aforesaid, was under a command or mandate by Kaufman given to Dewar, the manager of the Bank at London, contained in the letter enclosing the cheque, and that Kaufman had at the time of executing the assignment to the plaintiff, an existing right to revoke or recall this mandate, Dewar being Kaufman's agent for the purposes of this mandate, and that this right passed to the plaintiff by the assignment under the words in this respect of section 4 of R. S. O. ch. 124, before alluded to, the word "rights" being one of these words.

Section 43 of R. S. C. ch. 35, before referred to, not only says that "from the time any letter, packet, chattel, money or thing is deposited in the post office \* \* it shall cease to be the property of the sender," but goes on to say that it "shall be the property of the person to whom it is addressed or the legal representatives of such person."

This language seems as clear and strong as any words in which a law could be expressed, and I have not found anything in the Act to qualify it.

In England, as here, the sender of a letter cannot get it returned after it has been posted, and if the endorsee of a

bill authorizes the endorser to send the bill through the post office, the bill as soon as it is posted becomes the property of the endorsee: Sir G. Mellish, L. J., in *Ex parte Cote*, L. R. 9 Ch., at p. 32.

Judgment.  
Ferguson,  
J.

Here, it is true, there was not in form or in so many words, authority from the endorsee to send the endorsed cheque by post, but the sender was the treasurer of the virtual endorsee and he gave his instructions to Dewar, the bank manager, as such treasurer.

The money was raised (this very cheque obtained) by him for the purpose of making good moneys belonging to the township which he had wrongly taken or misapplied. The cheque was endorsed by Kaufman no doubt with the intention of passing the property in it, and was mailed by him as before stated.

Taking these circumstances into consideration, and looking at the clear and strong language of the Act, R. S. C. ch. 35, sec. 43, before referred to, I arrive at the opinion that Kaufman had not, at the time of or immediately before making the assignment to the plaintiff, the right that it was contended he had, and that such alleged right could not have passed to the plaintiff by the assignment.

As to the alleged fraudulent preference contended for, I am treating this cheque (which was not the cheque of Kaufman himself) as being a security for money, and not money. This, I think, I am bound to do by the case of *Davidson v. Fraser*, 23 A. R. 439, although that case was not (in respect to the character of the cheques) precisely like the present case. As I understand the case, however, I think enough appears to bind me as above.

The duties of Kaufman as treasurer of the township were to receive and safely keep all moneys belonging to the corporation, and to pay out the same to such persons, and in such manner, as the laws of the Province and the lawful by-laws or resolutions of the council of the municipal corporation should direct: 55 Vict. ch. 42, sec. 250 (O.), which is the same as the former enactment on the subject;

**Judgment.** the condition of the bond given by Kaufman and his sure-  
**FERGUSON,** ties adds the words "and duly account for and pay over  
**J.** all moneys which may come into his hands by virtue of his office."

The auditors, in auditing Kaufman's accounts, did not find or report that he was indebted to the corporation for the sums mentioned by them, but only that these respective sums were at the respective times in the hands of the treasurer, Kaufman.

The 7th of the admissions before me contains the statement that no officer or councillor of the township knew of the deposit till after the assignment, or knew that Kaufman was unable to pay the amount shewn due by the report till after the 29th day of February, 1896, but, notwithstanding the words "pay" and "shewn due" employed here, and notwithstanding the words mentioned above appearing in the condition of the bond, apparently extending more or less the duties defined by the statute, I am of the opinion that Kaufman, as treasurer of the municipality, was a trustee.

He was entrusted with the moneys of the corporation, he had defined duties to perform, and for the performance of these he had given security. I cannot discover any reason for saying that he was not a trustee, and I think it manifest that he was a trustee for the benefit of the township.

I do not perceive that the existence of the bond can vary the relationship. No argument was based on this. The bond was a mere security against misconduct in the actual relationship. It was a bond falling under the provisions of the statute of William III. In an action upon it breaches would have to be assigned, and the recovery, if any, for breaches, would sound in damages and not in debt.

Then, being such trustee, he had misappropriated a part of the trust moneys, and being so in default and, as I think, criminally liable in respect of the default, he made this effort to restore and replace the moneys that he had so wrongly taken or misappropriated.

In the case of *Molsons Bank v. Halter*, 18 S. C. R., at pp. 93, 94, the learned Chief Justice says: "The question we have to determine is, in the abstract, whether a conveyance or mortgage by a defaulting trustee to his co-trustees, made when the defaulter is in a state of insolvency, with the object and intent of making good to the trust estate moneys which he has abstracted from the trust fund and appropriated to his own use, is to be considered a preference of one creditor to another, or as having the effect of such a preference within this second section. Again concurring with the learned Judges who formed the majority in the Court of Appeal, I am of opinion that the answer to this must be in the negative, for the reason that the persons for whose benefit the security was given were not creditors within the meaning of this section of the statute, but have rights higher than those of creditors."

Judgment.

FERGUSON,  
J.

The learned Chief Justice refers to several English authorities which he says are precisely in point, deciding that the doctrine of fraudulent preference has no application to such a state of facts as the evidence before him disclosed, and in some of these it is broadly laid down that in such cases the relationship is not that of debtor and creditor at all, but the relationship of trustee and *cestui que trust*.

If, then, I am right in thinking that Kaufman was a trustee, and that the relationship of trustee and *cestui que trust* is the one that existed between Kaufman and the corporation of the township, the reasoning of the learned Chief Justice is of direct application here, although it may be said that the case before him was not, in all respects, precisely like the present case, and the doctrine of fraudulent preference not having, as I think I am bound to say that it has not, any application to the case, then the fact that the assignment was made within the sixty days mentioned in the amending Act, does not make any difference one way or the other.

On the whole case, after the best consideration I have

**Judgment.** been able to give the subject, I do not see how the plaintiff  
**FERGUSON,** can succeed in his contentions, and I am of the opinion  
**J.** that the action fails.

The action should, as I think, be dismissed, and it is dismissed with costs.

The appeal was argued before BURTON, C. J. O., OSLER, and MACLENNAN, JJ. A., on the 6th of October, 1897.

*Wallace Nesbitt*, for the appellant. The Post Office Act, R. S. C. ch. 35, sec. 43, has not the effect attributed to it. It is apparent upon a reading of the whole Act and upon consideration of the objects thereof, that the Dominion Parliament passed section 43 for the purpose of defining, as an incident to the postal service, where the property in any letter should be at any given time as between the post office authorities, the sender of the letter, and the person to whom it is addressed, and that it was not intended to declare that the mere mailing of a letter should effect, in property sent by post, a change never contemplated by the sender, and not in any sense essential to the due working of the postal service. The treasurer was a debtor of the township, and not a trustee. He had, as the admissions shew, "for several years used the township's moneys as his own," paying the balance due to the township when called upon to do so. The township had by resolution adopted the auditors' report shewing the treasurer to be a debtor to it, and the doctrine, therefore, of *Molsons Bank v. Halter*, 18 S. C. R. 88, does not apply. The treasurer being a debtor voluntarily handed the cheque to the township, and this was a preference. There was no demand or pressure, and the handing over of the cheque was never adopted or ratified by the township. The cheque was a security within the Act: *Davidson v. Fraser*, 23 A. R. 439. But even if the transaction is not a fraudulent preference, the plaintiff should succeed. The bank manager at London was the agent of the treasurer for the purpose of depositing the cheque to the credit of

the defendant township. Before he had acted upon the authority conferred upon him, the treasurer had, by making an assignment for the benefit of his creditors, which vested in the assignee all his property and effects, revoked the authority of the bank manager to deal with the cheque: *Scott v. Porcher*, 3 Mer. 652; *Simonton v. First National Bank*, 24 Minn. 216. Argument.

*Aylesworth*, Q. C., for the respondents. From the time when Kaufman posted the letter addressed to the manager of the Canadian Bank of Commerce at London, he parted with all control and dominion over the letter and its contents and they became the property of the Canadian Bank of Commerce. The bank received the letter and the cheque enclosed therein as of the evening of the 27th of February for and on the behalf of its customer the township of Wilmot, and upon the actual receipt thereof on the 28th of February were bound to immediately place the amount of the cheque to the credit of the township. Kaufman, the treasurer of the township, had no private account with the bank, nor was he its customer, and he sent the cheque to the bank as the property of and belonging to the township, with the necessary instructions to the bank to place the amount of the cheque to the credit of the account of its customer the township, and the bank received it for that purpose only. In effect, what was done was the same as if Kaufman had with his own hand deposited the cheque in the bank to the credit of the township on the 28th of February, and the failure of the bank to make the entry to the township credit could not deprive the township of its right to the amount of the cheque. There was a binding obligation on Kaufman to place the sum in question to the township's account, and the act of sending the cheque to the Bank of Commerce was done in performance of that obligation, and it was not revocable by Kaufman. The knowledge of Kaufman that the money was to be placed to the credit of the township was in itself sufficient information to the township of the direction to the bank to place it to the township's credit. Even if the direction



**Argument.** was revocable and was revoked by the assignment, still that revocation was ineffectual without notice to the bank, and the crediting of the amount without notice was good and made the receipt by the township of the amount valid and effectual as against the appellant or any one claiming through Kaufman. The transaction was not a preference nor a fraud upon any creditor of Kaufman. He was trustee for the respondents, and held the amount of the cheque in trust for them, and it was placed in their account in the bank in performance of the trust. This was a payment in cash and not merely the handing over of a security as in *Davidson v. Fraser*, 23 A. R. 439. The cheque had been accepted and marked "good" by the bank, and had been charged against the drawers' account, and it was, therefore, to all intents and purposes a bank note: *Boyd v. Nasmith*, 17 O. R. 40; *Merchants Bank v. State Bank*, 10 Wall., at pp. 647-8.

*Nesbitt*, in reply.

November 9th, 1897. BURTON, C. J. O.:—

Two questions arise on this appeal, first, whether a transfer made by the debtor on the eve of insolvency was a fraudulent preference, and if not, whether the proposed transfer was in fact revoked before it was actually carried out by reason of his having executed a deed of assignment to the plaintiff, under the statute, for the benefit of creditors.

The question of whether there has been a fraudulent preference depends, as has been frequently said, not upon the mere fact that there has been a preference, but also on the state of mind of the person who made it, and the tribunal adjudicating upon the matter must find out what he really did intend.

It is clear, I think, upon the evidence here, that the money was borrowed and transferred, not from any particular regard that the debtor had for the parties whose moneys he had misappropriated, but for his own benefit in order to shield himself from the consequences of a

breach of trust. The learned Judge has found that that was his motive and I do not think an appellate court could interfere with such a finding unless it was manifestly erroneous.

Judgment.

BURTON,  
C.J.O.

But it is contended that the money deposited with the Bank of Commerce, at London, at the time of the making of the assignment, belonged to Kaufman and therefore passed to the assignee.

It may be conceded that where a debtor, for his own convenience or for any other motive, delivers money to another person to be paid to his creditor in discharge of his debt, until the money is actually paid over or the assent of the creditor to such disposition of it has been given, the debtor may appropriate it to any other purpose; but it appears to me that this case is very different.

The marking of the cheque by the bank was to enable the holder to use it as money, and was a clear intimation that funds had been set apart for its payment to the holder. This equivalent for so much money is acknowledged by Kaufman to belong to the township and is remitted by him to the bank, not as his agent, and to await further instructions—for he had no account at the bank—but treating them as the bankers of the township, and it appears to me that no actual credit in their books was essential; and the failure of the bank so to credit it would not deprive the township of its right to the amount of the cheque.

The money was so received by the bank before the assignment, and was so received by them with notice that it belonged to the township, and was to be placed to their credit, and it would seem to be clear that it was not the intention of the debtor to reserve to himself any right or power to undo what he was doing, and that he intended that it should be irrevocable, and that having admitted the money to be the money of the township, any attempt on his part, individually, to revoke the instructions given would be futile, and having parted with any control over the money before the assignment, the execution of that document could not vest the property in the assignee nor revoke the disposition which had already become complete

Judgment. by the receipt of the money by the bankers on behalf of  
BURTON, their customers.  
C.J.O.

I am of opinion, therefore, that on both grounds the plaintiff fails and that the judgment of the learned Judge should be affirmed.

OSLER, J. A.:—

There are two questions in the case.

1. Whether, at the time of the execution of the assignment by Kaufman, the defaulting treasurer of the defendants, the cheque had passed beyond his control.

2. If it had, whether the transfer was a preferential payment or transfer avoided by the Act.

As to the first. The transfer was a transfer to the bank, not the bank agent. The bank received it through their manager shortly after three o'clock on the 28th February, 1895. I think it quite immaterial whether it was received before or after bank hours. It was neither more nor less than a sum of money or a piece of paper representing it delivered to and received by the bank as a deposit, or to be placed to the credit of the defendants. I am wholly unable to understand how the fact of the entry in the bank books not having been made until the following morning can make any difference. It is inaccurate to say that Dewar, the bank manager, received it in any sense as agent for Kaufman, or subject to his further mandate. He received it *quod* the bank, and so receiving it the bank became bound to give the defendants credit for it and to honour their cheques to the amount thereof. He was as much the agent of Kaufman as a receiving teller who takes money or securities over the counter with a deposit slip, is the agent of the depositor, but no more. After its receipt by the bank the depositor cannot recall it. It becomes the money of the bank, liable to be withdrawn or transferred in the usual way by cheque of the party to whom the bank has become debtor, and not otherwise: *Foley v. Hill*, 2 H. L. C. 28. I am of opinion that the moment Dewar, that is to say the bank, received the cheque on the terms of the direction contained in Kauf-

man's letter, the property in it was changed. It became the property of the bank, who had no other duty to perform than to honour cheques duly drawn upon them by the defendants to the amount thereof, and the general assignment for the benefit of creditors made by Kaufman at a later hour of the same day could not affect it.

Judgment.

OSLER,  
J.A.

As to the second point. The payment or transfer seems to me not obnoxious to the statute. Kaufman had certainly received the money, which the transfer was intended to make good, as trustee for the township defendants. He received it in his capacity of treasurer, and his duty was to have applied it according to law. Then he became a defaulting trustee, for he applied it to his own private purposes. We cannot assume that this was done with the assent of the township, or that they had lent him the money. The authorities warrant us in inferring that his motive or intent in restoring the money was, not to prefer a creditor, but to repair a wrong, or even perhaps to avoid some evil consequence to himself: *New's Trustee v. Hunting*, [1897] 2 Q. B. 19; *Ex parte Taylor*, 18 Q. B. D. 295; *Molsons Bank v. Halter*, 18 S. C. R. 88.

For these reasons, which are not opposed to any thing which has been said by my brother Ferguson, though he seems to have rested his judgment mainly upon grounds on which I do not find it necessary to express an opinion, I would affirm the judgment and dismiss the appeal.

MACLENNAN, J. A. :—

I also am of opinion that the judgment should be affirmed.

The replacement of the money of the township which the debtor had used in his business must be held, on the authority of *Molsons Bank v. Halter*, 18 S. C. R. 88, not to have been a fraudulent preference.

It was argued, however, that the appropriation of the money to the use of the township was incomplete when the assignment for creditors was made, and that it passed to the assignee and not to the township. I am of opinion that this contention is not well founded. Kaufman

Judgment. had been and continued to be the treasurer of the township, notwithstanding his insolvency, and notwithstanding his assignment. If he had never used the township's money for his own purposes, and if he had received the cheque in question from the solicitors in some actual ordinary township transaction, no one would suppose or contend for a moment that it passed to his assignee, although it was actually in his own hands at the time of the assignment. It would not be his property but the property of the township in his hands. In my opinion the cheque was as much the property of the township when Kaufman received it, as if he had never used the money for his own purposes. It is not disputed that he made the chattel mortgage for the very purpose of replacing the township funds, and that for that purpose he received and held the cheque while it was in his hands. Being himself the treasurer, the cheque was at home in his hands, just as any other money or securities of the township would be. If that were at all doubtful, all question is set at rest by the endorsement of the cheque and its transmission in the letter to the bank agent, requesting it to be deposited to the credit of the township, and signing his name as treasurer. The cheque having been "accepted" by the bank on which it was drawn, was a chose in action. The money which it represented was a fund appropriated to that particular cheque in the hands of the Bank of Commerce. The endorsement of the cheque and the letter were an assignment in writing of the chose to the township, and at the same time a notice to the bank, the holder of the fund, of the assignment, which made the title of the township complete, in priority to the claim of the assignee, even if the cheque could be supposed to have passed to the assignee for creditors. See *New's Trustee v. Hunting*, [1897] 2 Q. B. 19.

I am, therefore, of opinion that the title of the township to the cheque, or the money which it represented, cannot be questioned, and that the appeal should be dismissed.

*Appeal dismissed.*

R. S. C.

## CRAWFORD V. CANADA LIFE ASSURANCE COMPANY.

*Chose in Action—Assignment—Notice—Life Insurance.*

A debtor, or trustee of a fund, is not responsible to an assignee of the creditor, or payee of the fund, for dealing with the latter persons without reference to the assignment unless it is found either that at the time of so dealing he actually knew of the assignee's title, or that he had previously received a notice sufficiently distinct to give him an intelligent apprehension of the fact that the assignee had acquired an interest in the claim or fund.

A life insurance company issued two policies upon a man's life, one policy being payable generally and the other to his wife. The assured made an assignment for the benefit of his creditors, and the assignee, who at the time knew only of the policy payable generally, wrote to the company referring to this policy by number and informing them of the assignment. The assured's wife had died before the assignment was made and the policy in her favour had become part of the assured's estate and had passed to the assignee. A few weeks after notice of the assignment had been given to the company the assured informed them of his wife's death, and obtained from them the surrender value of the policy in which she was named as beneficiary. There was no imputation of bad faith, and the officers of the company swore that they had, at the time, no recollection of notice of the assignment for the benefit of creditors having been given :—

*Held*, that under the circumstances the company were not responsible for paying the surrender value of the policy to the husband.

Judgment of FERGUSON, J., reversed.

THIS was an appeal by the defendants from the judgment of FERGUSON, J. Statement.

The plaintiff was the assignee for the benefit of the creditors of one Donald Fraser, under an assignment made on the 25th of September, 1895, and brought the action against the defendants, who carried on the business of life insurance, to recover the surrender value of a policy upon Fraser's life issued by them. At the time of the assignment for the benefit of creditors two policies upon Fraser's life were in force; the first, No. 39,118, for \$5,000, was payable generally, and the other, No. 41,572, also for \$5,000, was payable to the assured's wife. The plaintiff knew that the first policy was in force, but did not know that there was a second policy. On the 20th of December, 1895, the plaintiff wrote to the defendants, a letter, headed "Re D. Fraser, En. Policy 39,118," stating that an assignment for the benefit of creditors had been made by Fraser

**Statement.** to him, and asking the surrender value of the policy. The defendants answered that the surrender value of policy No. 39,118 was \$1,951, but that it had, as the fact was, been assigned to the Merchants Bank of Canada.

Before the assignment for the benefit of creditors, Fraser's wife, the beneficiary named in policy No. 41,572, had died, and that policy was in fact at that time part of his estate. The defendants did not make in their books any note of the fact of Fraser's assignment, and in January, 1896, on his application, and upon proof of his wife's death, they, in good faith, paid to him \$902, the surrender value of that policy.

The action was tried at Kingston, on the 19th of October, 1896, before FERGUSON, J., who gave judgment in the plaintiff's favour, holding that sufficient notice of the assignment for the benefit of creditors had been given.

The appeal was argued before OSLER, MACLENNAN, and MOSS, JJ. A., on the 17th of September, 1897.

Bruce, Q.C., for the appellants.

S. H. Blake, Q.C., and Smythe, Q.C., for the respondent.

The following cases were cited and commented on: *Palmer v. Locke*, 18 Ch. D. 381; *Re Tichener*, 35 Beav. 317; *Lloyd v. Banks*, L. R. 3 Ch. 488; *Browne v. Savage*, 4 Drew. 635; *Ex parte Agru Bank*, L. R. 3 Ch. 555; *Alletson v. Chichester*, L. R. 10 C. P. 319; *Low v. Bouverie*, [1891] 3 Ch. 82; *North British Ins. Co. v. Hallett*, 7 Jur. N. S. 1263; *Ex parte Stright*, 2 Dea. & Ch. 314; *Société Générale de Paris v. Tramways Union Co.*, 14 Q. B. D. 424; *Saffron Walden, etc., Society v. Rayner*, 14 Ch. D. 408.

November 9th, 1897. OSLER, J. A.:—

The question is whether the plaintiff gave notice to the company that he was assignee of the fund, the policy No. 41,572, by the letter of the 20th of December, 1895. I read that letter as sufficiently conveying to the company's secretary information that Fraser, the insured, had made

an assignment to the plaintiff for the general benefit of his creditors under the statute, and that in that capacity he was entitled to policy No. 39,118. But has it any other effect? Take it in the sense most favourable to the writer, not restricted or limited by the reference to that policy. It is, then, a general notice of the fact that he had become assignee for the general benefit of the creditors of Fraser, a person insured in the company.

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OSLER,  
J.A.

The company being then ignorant of the death of Mrs. Fraser, their knowledge at that time was that Fraser was the owner of policy 39,118, subject to the transfer thereof to the Merchants Bank, and that Mrs. Fraser was the beneficiary of the policy 41,572, her husband not being interested therein. When, therefore, they were informed of Fraser's assignment for the benefit of his creditors, this conveyed to them no information as to the plaintiff's title to the latter policy. It was simply a fact irrelevant to it, so far as they knew, or had means of knowing. How then can it be said that notice was given by that letter that the plaintiff was the owner of the fund?

It is notice of that kind which is required to fasten the trustee with responsibility in dealing with the fund. The plaintiff was the person who knew, or ought to have known, of his right in regard to policy 41,572, and who should have informed the defendants of their changed position. The only notice he gave them would have, as far as would appear to them, had they upon its receipt consciously applied it to that policy, no bearing upon it. Its effect would naturally appear to them to be exhausted when they had given the information requested as to the other.

It cannot, in my opinion, be held to have been such a notice as, in the language of Lord Cairns in *Lloyd v. Banks*, L. R. 3 Ch. 488, would lead them "to an intelligent apprehension of the nature of the encumbrance which has come upon the property." We cannot hold that the bald fact communicated was one which the company was bound to bear in mind in relation to it, and having been in fact forgotten, as the learned trial Judge held, when they came



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**OSLER,  
J.A.**

to deal with it afterwards on Fraser's title being brought to their knowledge, I think we must hold them not to have been affected by it, and therefore, with all respect to the learned trial Judge, must allow this appeal. I rely upon the case above referred to, and upon *Saffron Walden, etc., Society v. Rayner*, 14 Ch. D. 408.

MACLENNAN, J. A. :—

The question in this case is the sufficiency of the notice to the defendants of the assignment to the plaintiff of the policy of insurance No. 41,572, dated the 25th January, 1887, on the life of Donald Fraser. The notice relied on is the letter from the plaintiff to the defendants' secretary of the 20th of December, 1895, and the answer thereto of the 24th of December. The letter of the plaintiff relates to a different policy on Fraser's life, and enquires the surrender value. It states that Fraser is insolvent, and that his estate has to be wound up, and the plaintiff signs it, "R. Crawford, assignee estate of D. Fraser." The fact was that the policy 39,118 had been assigned absolutely by Fraser to the Merchants Bank, and the secretary answered the letter by stating that the surrender value was \$1,951, but that it had been absolutely assigned to the bank, and in consequence would not belong to the insolvent's estate. Now, the first observation to be made on this letter and the answer to it is that they had no relation whatever to the policy in question. The plaintiff's letter does not profess to be, nor was it intended to be, a notice in relation to it; and the fact being that the policy enquired about had been absolutely assigned to the bank, there was no occasion for the secretary to give the matter further thought or attention after answering the letter. I think it would not, naturally or necessarily, bring to the secretary's mind any thought of the other policy, or that it might be affected by the assignment, but that, naturally, he would think no more about it; and it appears from Mr. Hills' evidence that that is just what happened; and even if the enquiry

had called up to his mind the thought of the other policy, he would probably have dismissed it at once from his mind, remembering that it was one for the benefit of Fraser's wife, and not for his own benefit. Nothing is more improbable than that he would reflect that if Mrs. Fraser happened to be dead, her husband might himself be entitled to the benefit of the policy, and that his interest might have passed by the assignment. On his wife's death Fraser might have appointed the policy in favour of his mother or his children, or some of them; and it did not necessarily follow that he had any interest in it at the time of the assignment. The truth was that Mrs. Fraser had then been dead for more than a year, but the company was not then aware of the fact. Upon the evidence it must be taken that when, about twelve days afterwards, D. M. Fraser on behalf of the assured enquired of Mr. Hill the surrender value of the wife's policy, and notified him of her death about two years previously, he had forgotten all about the plaintiff's statement, in the letter of the 20th of December, that Fraser had made a general assignment for the benefit of creditors. It may be that even if he had remembered it, it would not have occurred to his mind that the assignment would have operated to transfer the policy to the assignee, for that was a question of law depending on the construction of the statutes relating to insurances for the benefit of wives and children. The interval between the two transactions was certainly short, but considering the large business of the defendant company, it is perhaps not surprising that in January Mr. Hill did not recall what had taken place in December.

Now, what the plaintiff must make out is, that when the defendants surrendered the policy to Fraser, and paid him the money, they had notice of three things; first, that Mrs. Fraser was dead; second, that the legal effect of her death was that the policy had become the property of her husband; and third, that the husband had assigned the policy to the plaintiff. Where notice has been distinct and explicit, it will not do for the party to say that he has

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MACLENNAN,  
J.A. forgotten it. He is bound to remember. But where it is not distinct and explicit, it is not his fault if the imperfection of the notice has left his mind and memory without the necessary impression. The notice or knowledge must be such as to make it just for a Court to hold that his conscience must be affected. I think that is the result of the authorities which have been cited to us

In *Re Tichener*, 35 Beav. 317, Lord Romilly said: "There must be something bringing the encumbrance distinctly and clearly to the mind and attention of the trustee. It must amount to this: mind and remember this, and if any one enquires of you, inform him that the trust fund is encumbered. \* \* The notice must be formal notice which the trustee is bound to remember. \* \* Take notice that A. B. has encumbered the trust fund for £100, therefore take a note of that, in order that you may inform any one who may enquire of you on the subject."

In *Ex parte Agra Bank*, L. R. 3 Ch. 555, Lord Hatherley said: "The point is whether or not it is in their capacity of directors, as agents and managers of the company, that the information is acquired, deliberately, formally, and for the very purpose of guiding themselves in their course of action."

In *Lloyd v. Banks*, L. R. 3 Ch. 488, Lord Cairns referred to the difficulty which the Court will always feel in attending to any kind of intimation which will put the trustee in a less favourable position than he would have been in if he had got distinct and clear notice. He then distinguishes between notice and knowledge, and says that there must be "proof that the mind of the trustee has been brought to an intelligent apprehension of the nature of the encumbrance which has come upon the property; so that a reasonable man, or an ordinary man of business, would act upon the information and would regulate his conduct by it in the execution of the trust. If it can be shewn that in any way the trustee has got knowledge of that kind, knowledge which would operate upon the mind of any rational man, or man of business, and make him act with

reference to the knowledge he has so acquired, then I think the end is attained."

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• MACLENNAN,  
J.A.

These were cases of notice to trustees of encumbrances upon the trust funds, but the law must be the same in a case like the present, and in *Alletson v. Chichester*, L. R. 10 C. P. 319, a case relating to a policy of insurance, the learned Judges intimate that the notice must be precise, that the matter must be distinctly brought to the attention of the company, and not incidentally. What is charged in the present case is partly notice, and partly knowledge. Notice of an assignment, and knowledge of the death, and that thereby the policy became the property of the assignor. But the notice was at a time when it required no attention, and the knowledge came after the notice had been forgotten.

I am, therefore, of opinion that the appeal ought to be allowed, and that the action should be dismissed.

Moss, J. A. :—

The policy in question in this case, No. 41,572, bears upon its face a note that it is issued in terms of an Act to secure to wives and children the benefit of assurance on the lives of their husbands and parents. It recites that Donald Fraser, the person assured, proposed to effect the assurance for the benefit of his wife, Winnwood Mary Fraser, and contains an agreement that upon the death of Donald Fraser, the policy having in the meantime been duly kept on foot by payment of the yearly premium, the defendants will pay to "the party for whose benefit this assurance is effected" the sums secured thereby.

Prior to the receipt on the 24th of December, 1895, of the plaintiff's letter of the 20th of December, the defendants had knowledge that they had issued two policies upon the life of Donald Fraser which were then on foot; that one of them, No. 39,118, appeared to be absolutely assigned to the Merchants Bank; and that the other, No. 41,572, was effected under the Act to secure to wives and children

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**Moss,  
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the benefit of life assurance, and was on its face for the benefit of Mrs. Fraser. But they did not know that she had died a year and a half or two years before, nor that on the 25th of September, 1895, Donald Fraser had made an assignment for the benefit of his creditors under R. S. O. ch. 124, and amending Acts, to the plaintiff.

The plaintiff had on or before the 20th of December, 1895, become aware that Donald Fraser had effected policy No. 39,118 with the defendants, but apparently not that it was assigned to the Merchants Bank. And apparently at that time he had no knowledge of policy No. 41,572.

In this condition of things the letter of the 20th of December, 1895, is written to and received by the defendants. It was received at the head office in Hamilton by Mr. Hills, the defendants' secretary, who, according to his own statement, has the office management to a large extent, and receives and deals with the correspondence.

He is one of the two persons named in a memorandum printed upon the defendants' policies as the only persons upon whom service is to be made of any notice or intimation of any assignment of, or charge upon, any policy. He was the proper person to receive the information contained in the letter of the 20th of December, 1895, and that letter was received by him in the course of the transaction of the defendants' business, and in the course of his duty he replied to it by the letter of the 24th of December. The terms of that letter shew that there had been conveyed to Hills' mind a distinct intimation that Donald Fraser had made an assignment to the plaintiff for the benefit of his creditors, and that his estate was being wound up. And apart altogether from the distinct reference to policy No. 39,118 in the plaintiff's letter of the 20th of December, it imposed upon the defendants the obligation of attending to the effect of the assignment upon Donald Fraser's rights with regard to that policy, for, aside from the assignment to the Merchants Bank, that policy formed a part of his estate. But the letter gave no information as to the death of Mrs. Fraser, and in no other way drew attention to policy No.

41,572. In the then state of the defendants' information the fact of Donald Fraser having made an assignment had no significance with reference to policy No. 41,572, for with Mrs. Fraser living at the date of the assignment no right to the policy would have passed to the plaintiff. It was the fact, then unknown to the defendants, of the death of Mrs. Fraser before the date of the assignment, that had operated to vest the policy in the plaintiff.

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Moss,  
J.A.

Under these circumstances were the defendants justified in dealing with Donald Fraser with reference to the surrender by him of the policy instead of with the plaintiff?

If at the time the defendants dealt with Fraser there was in fact in their mind, or in the mind of their officer Mr. Hills, a knowledge or recollection of the assignment to the plaintiff, but they, nevertheless, had ignored him, and dealt with Fraser, they could not escape liability to the plaintiff. But Hills' testimony is that at that date he had forgotten the information given in the letter of the 20th of December about Fraser's assignment to the plaintiff. At first view this may appear strange, but there is no reason for thinking it incorrect, or for supposing that the defendants were colluding with Fraser to cut out the plaintiff's claim under the policy.

So that this is not a case of knowledge—apart from notice—of the fact of the assignment, existing in the mind of the defendants or its officers at the time of the dealing. It is a question of whether the letter of the 20th of December, was, to use the language of Bramwell, L. J., "notice of such a character as that it would lead the defendants as prudent people to make it a part of their knowledge as a thing by which they were to govern their conduct in the future": *Saffron Walden, etc., Society v. Rayner*, 14 Ch. D. 408, at p. 418.

If at the date of the receipt of that letter the defendants had been aware, or if by the letter they had been informed, of the fact of Mrs. Fraser's death, there would have been presented the question whether the information was of a character rendering it incumbent upon the defendants to

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J.A.

retain it in their recollection in their subsequent dealings with policy No. 41,572. But in the absence of that knowledge or information, the letter made no call upon the defendants to connect the fact of the assignment with a policy which they had then no reason to suppose formed any part of Donald Fraser's own estate.

In the case referred to, James, L. J., puts the test in this way: "Was there a communication made to the trustees in such a way as to give them an intelligent apprehension of the fact that they had received a notice which would make it untrue in them to say to anybody else that they had not received that notice?"

Applying this test, and supposing that between the 24th of December, 1895, and the 3rd of January, 1896, an enquiry had been made of the defendants whether there had been any assignment of, or incumbrance upon, policy No. 41,572, it would not, I think, have been an untruthful answer if they had stated "we have not been notified of any."

The case of *Leslie v. Baillie*, 2 Y. & C. C. C. 91, appears to support in principle the defendants' contention. There a lady entitled to a legacy and other benefits under the will of an English testator made in England, was married in Scotland to a domiciled Scotchman, who died before the legacy and other benefits became payable to or receivable by his wife. After his death and the happening of the events which under the will rendered the legacy and other benefits payable, the widow made application to the executors or trustees under the will for payment to her, and under the belief that she was entitled, as she was under the law of England, to receive the amounts as choses in action not reduced into the possession of her husband during his lifetime, they paid her. By the law of Scotland the marriage vested these choses in action absolutely in the husband, and the payments were, therefore, made to the wrong person. But upon a bill filed to compel the executors and trustees to pay over again, Vice-Chancellor Knight Bruce held them not liable. He treated the marriage as an assignment in fact, but held that notice of the

marriage was not notice to them of the assignment, for Judgment.  
 they were not bound to know that that was the effect of Moss, J.A.  
 the marriage.

Here notice of the assignment to the plaintiff was not notice that the policy No. 41,572 had by reason thereof vested in the plaintiff, for there was no notice of Mrs. Fraser's death.

There was, therefore, no obligation imposed on the defendants to retain in recollection the information as to Donald Fraser's general assignment to the plaintiff in their subsequent dealings with policy No. 41,572.

*Appeal allowed.*

R. S. C.

### LELLIS V. LAMBERT.

*Husband and Wife—Alienation of Husband's Affections—Adultery of Husband—Damages—Married Women's Property Act—R. S. O. ch. 132.*

Neither at Common Law, nor under the Married Women's Property Act, R. S. O. ch. 132, will an action lie by a married woman against another woman to recover damages for alienation of her husband's affections, and for committing adultery with him.

*Quick v. Church*, 23 O. R. 262, overruled.

Judgment of a Divisional Court reversed.

THIS was an appeal, by leave, by the defendant from the judgment of a Divisional Court [ARMOUR, C. J., FALCONBRIDGE, and STREET, JJ.], affirming the judgment of ROBERTSON, J., at the trial.

The plaintiff was a married woman and brought the action against the defendant, who was a widow, to recover damages for the alienation by the defendant of the affections of the plaintiff's husband, and for her adulterous intercourse with him.

The action was tried at Toronto on the 4th and 5th of November, 1895, before ROBERTSON, J., and a jury, when a verdict was given in the plaintiff's favour for \$1,500 damages for alienation of the husband's affections, and \$750 for



Statement. the adulterous intercourse, and judgment was entered for both sums with costs. This judgment was affirmed by the Divisional Court, who followed on the question of law the case of *Quick v. Church*, 23 O. R. 262, and refused to give effect to certain objections made to the charge and as to reception and rejection of evidence.

The appeal was argued before BURTON, C. J. O., OSLER, MACLENNAN, and MOSS, JJ.A., on the 17th of May, 1897.

*W. R. Smyth*, for the appellant.

*E. E. A. DuVernet*, for the respondent.

November 9th, 1897. BURTON, C. J. O. :—

The case differs in many respects from *Quick v. Church*, 23 O. R. 262, where the husband was induced by the defendant to leave his wife and to remove to another country, and reside with her permanently in adultery, and there was loss of support, but on the general question as to such an action being maintainable this is in effect an appeal from that decision.

In that case, in a well considered judgment of the Queen's Bench Division, delivered by Armour, C.J., nearly all the cases in the American Courts are collected and considered. In the great majority of those cases the action was held to be maintainable since the passage of the statutes in force there allowing the wife for her own benefit to sue for personal wrongs suffered by her.

The learned Chief Justice held that the facts in evidence and the findings of the jury constituted a good cause of action at common law; that the only difficulty in the way of enforcing it lay in the necessity of joining the husband and in his being entitled to the damages when recovered, and he then declares that this difficulty has now been removed by the Act respecting the property of married women allowing the wife to sue without joining the husband, and giving her the damages when recovered as her

separate property, and he comes to the conclusion, therefore, that the action is maintainable.

Judgment.

BURTON,  
C.J.O.

I shall presently endeavour to point out the difference between the language of our statutes and those of several of the States of the Union under which in the majority of the American cases the action has been held to be maintainable.

In the case of *Lynch v. Knight*, 9 H. L. C. 577, Lord Chancellor Campbell did make a remark, which though obiter is no doubt entitled to great weight, that he could not allow that the loss of *consortium* or conjugal society can give a cause of action only to the husband; that the loss of conjugal society is not a pecuniary loss, and he thought it might be a loss which the law might recognize to the wife as well as to the husband.

But he proceeds in a subsequent portion of the judgment to say that the better opinion is that a wife could not maintain or join in an action for criminal conversation against the paramour of her husband who had seduced him

Lord Wensleydale was of opinion that even in a case where the loss of the *consortium* was clearly caused by a wrongful act of the defendant no action by the wife would lie, and he puts this case: Suppose that an action were brought by the wife for false imprisonment of the husband by the defendant for a period of time by which she lost the *consortium* of the husband during that time, would such action lie? If it would not *a fortiori* no action could be maintained for slander attended with the special damage of the loss of the husband's society caused immediately by his own act.

The other portion of the claim, which has been treated as a distinct and separate cause of action, must be treated simply as an action for criminal conversation, as there is no evidence of the husband living in adultery with the defendant. This ground of complaint has at least the merit of novelty, and to those who at an earlier date were accustomed to consider actionable wrongs with the eyes of a spe-

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BURTON,  
C.J.O.

cial pleader when pleading was a science, and to revolve in their minds how they would formulate a claim in legal phraseology, it assumes almost a ludicrous appearance.

The usual form of pleading was in trespass, and would read something like this, omitting some of the allegations of the act being done wrongfully, wickedly and unjustly, that the defendant debauched and carnally knew the man, and thereby his affection for the plaintiff was destroyed, and she was deprived of the comfort, fellowship and society of her husband. It might be difficult in proof to sustain these allegations, but assuming the defendant to have occupied a more passive position whilst it might be evidence tending to shew an intent to alienate the husband's affection, and thereby to sustain the first ground of complaint, the criminal conversation in itself would furnish no ground of action. I think, therefore, that this portion of the claim should be dismissed.

If the law is reasonable in allowing an action by the husband for the loss of the *consortium* of the wife, it may be, as is held in some of the American cases, that no valid reason exists for not extending it to the wife, although in the case of *Lynch v. Knight*, 9 H. L. C. 577, a clear distinction is drawn between the benefit which the husband has in the *consortium* of the wife, and that which the wife has in the *consortium* of the husband for which the law has provided no remedy, but whether any such action existed at common law the remedy only being wanting by reason of the disability of the wife, it is clear that we must examine the statutes under which the American cases were decided, and compare them with our own before we can come to the conclusion that such an action is maintainable here. I incline to think that if it is held or declared by legislative authority that such an action is maintainable it will be a very fruitful source of litigation, and the advantages of allowing such an action are at least doubtful.

In *Westlake v. Westlake*, 34 Ohio St. 621, it was held that no such action would lie at common law, and it was only

allowed in that State by the statute that gave the wife a right of action for all violation of or injury to the wife's personal rights; but personal rights are not, as it is said, rights of person, the latter are physical, and the former are relative and general, and embrace all the rights any person may have, and all the wrongs he may suffer, and it is said in that judgment that the wife had no such right at common law in respect of which she could sue, but she might by force of the statute.

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BURTON,  
C.J.O.

But under a previous statute in the same State it was held in *Mulford v. Clewell*, 21 Ohio St. 191, which allowed a wife to sue "for injury to her property or person," she could not bring this action for the loss of the *consortium* of her husband.

In *Van Arnam v. Ayers*, 67 Barb. 544, it was held that the action would not lie at common law nor under the statute where the words of the enactment were "for injury to her person or character, or her separate property."

I may here remark that although this last case is cited in the last edition of Mr. Eversley's work on Domestic Relations, none of the other American decisions are referred to.

In *Logan v. Logan*, 77 Ind. 558, the action of the wife was for defamation, and stated as special damages the loss of the society of her husband; it was held that she might bring the action under the statute for "injury to her person or character," but it could not be extended to the loss of the society of her husband.

That case, it is true, was disapproved of in the case of *Haynes v. Nowlin*, 29 N. E. Rep. 389, but however much the reasoning in that case may commend itself to one as an argument for the Legislature to extend the law, it can hardly be regarded as a sound construction of the law the Court was called upon to decide.

The law had, however, been considerably changed since the previous judgment to which I have referred of *Logan v. Logan*, 77 Ind. 558.

One of the American statutes is in these words: "All

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personal property including rights in action belonging to any woman at her marriage, or which may come to her during coverture by gift, bequest or inheritance, etc., or have grown out of the violation of any of her personal rights, shall be and remain her separate property, and under her sole control."

This legislation is very wide ; it in effect entirely abolishes the common law unity of person, and in its stead introduces a rule somewhat analogous to that of the civil law, though going beyond the civil law as regards the recovery of damages in a suit of this nature.

In another State (Indiana) the language of the statute was this: "A married woman may bring and maintain an action in her own name against any person for damages for any injury to her person or character the same as if she were sole, and the money recovered shall be her separate property, and her husband in such case shall not be liable for costs."

Our statute law, as it stands at present, after providing that a married woman shall be capable of acquiring, holding and disposing by will or otherwise of any real or personal property as her separate property in the same manner as if she were a *feme sole* without the intervention of any trustee, goes on to provide that she shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of suing and being sued, in all respects as if she were a *feme sole*, and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding brought by or taken against her, and any damages or costs recovered by her in any such action or proceeding shall be her separate property, and any damages recovered against her in any such action shall be payable out of her separate property and not otherwise ; and by section 14 it is provided that she shall have in her own name against all persons whomsoever, including her husband, the same remedies for the protection and security of her own separate property as if such

property belonged to her as a *feme sole*, but except as therein excepted no husband or wife shall be entitled to sue the other for a tort.

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BUTON,  
C.J.O.

I should have thought that it was not intended by this section to give a general right to a married woman to sue and be sued as if she were a *feme sole* to all intents and purposes, but that the passage, found as it is in the same section which confers upon her new rights in respect to property, was intended to confer upon her also the power of suing for any injury to that property.

It was no doubt the intantion of the Legislature to increase the rights of married women to their property as against their husbands, and as she alone is interested in the property it became necessary to confer upon her the right to take proceedings against any one, her husband included, for the protection and security of that property, and at the same time to protect the interest of creditors with whom she might have dealings, enabling them to get at property which otherwise they could not reach. Full effect is given to the words of the Act by confining her right to sue and her liability to be sued to her separate property, and her contracts in respect of that property, and I do not think we are placing a narrow construction upon these words when we thus confine them.

The English Act of 1882 is almost word for word the same as our own, except that in addition to the words giving the power to sue and be sued, the English Act proceeds "either in contract or in tort or otherwise," words not to be found in our statute.

Mr. Eversley in his work (*Law of the Domestic Relations*, 2nd ed., p. 360), in commenting on the English Act remarks: "At a rough glance this Act would seem to render a married woman perfectly free and independent of her husband, and to clothe her in every respect with all the powers and freedom of a single woman. But on closer inspection this will be found not to be the case, but that she has by statute a power exercisable by her over all kinds of property which formerly could only be exercised

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by her in respect of property which was recognized by equity to be her separate property, or in respect of limited classes of property made separate estate by the legislation of 1870; in return for these extended powers her liabilities are considerably enlarged. Its effect is not so far reaching as that of the Divorce Act of 1857 in constituting the married woman who is judicially separated a *feme sole*."

Again (p. 361): "The change effected by this Act is limited to a married woman's proprietary rights, and to those alone; her matrimonial status is not affected—the common law right of the husband to her society and comfort remains; he is still the head of the family, and he it is who chooses and can change the matrimonial domicil. She is just as much bound to render him respect and regard as he is bound to support and protect her. It is when the question of property is touched that the interests of the two diverge. \* \* She may sue or be sued either in contract or in tort, or otherwise, as though she were single and her husband need not be joined with her as plaintiff or defendant—but the reason for this is plain, indeed follows in the same section after the conferring of her new capacity; it is that the result of the action in which she alone is concerned, whether as plaintiff or defendant, affects her property—if she succeed, what she recovers is her separate property; if she is cast, her separate property is to make good the damages or costs."

These extracts would seem to confirm the view I have above expressed as to the limited character of the right to sue, and in a recent case in England, *Robinson v. Robinson*, 13 Times L. R. 564, in which a married woman succeeded in an action for libel against her husband after obtaining a separation order against him under 58 & 59 Vict. ch. 39 (Imp.), it was conceded that such an action would not have been maintainable under the Married Woman's Act of 1882.

With great respect I think it should be left to the Legislature to determine whether such a right as is here asserted should be given to a married woman.

In this view of the case it is not necessary to consider the objections raised at the trial upon other points.

Judgment.

I am, however, of opinion upon the broader ground that the Legislature has not authorized a married woman to bring such an action, that the appeal should be allowed, and the action dismissed.

BURTON,  
C.J.O

OSLER, J. A. :—

The plaintiff is a married woman, the wife of one Matthew Lellis. She sues the defendant, a widow, for alienating her husband's affections from her, and also for having criminal conversation with him, *per quod* she has been deprived of his society, services and support, and suffered mental and bodily pain, loss of reputation, esteem of her friends, etc.

The statement of claim is in substance as follows:—

Par. 3. That in the autumn of 1893, and during the year 1894, the defendant wrongly alienated the affections of the plaintiff's husband from her. 4. That during that time the defendant was very intimate with him, constantly paying him undue attention, harbouring him at her house, driving with him, promenading and attending parties with him, lending him money to pay a fine and to stock his shop. 5. That she used all her influence to prevent him from supporting the plaintiff. 6. *Per quod* the plaintiff was deprived of the society, services and support of her husband, and suffered annoyance and disgrace, and mental and bodily pain, and loss of reputation and esteem of friends, etc. 7. The plaintiff further states that during the time aforesaid the defendant wrongfully had criminal conversation with Lellis, and lived in adultery with him. 8. *Per quod* the plaintiff was deprived of her support by her husband, and suffered in the loss of his society and mental and bodily pain, reputation, etc.

The defence is a general denial.

The action was commenced on the 4th of June, 1895, and was tried before Robertson, J., and a jury, at the Fall Assizes for Toronto in that year.



Judgment.OSLER,  
J.A.

The learned Judge in his charge to the jury dealt with the evidence at considerable length, and required them to answer certain questions, and finally told them: "You will observe that I put to you two branches of the case. Did the defendant alienate the affections of the plaintiff's husband from his wife without having committed adultery and living in adultery with him? That she could have done and not have committed adultery. She could have done that first, and have committed adultery with him afterwards. You are at liberty to give damages on both. You may say the plaintiff is entitled to recover so many dollars for alienating the affections of her husband, and so many dollars on the other branch if you find that the defendant committed adultery with him."

The jury assessed damages at \$1,500 for alienation of the husband's affections, and \$750 for the criminal conversation and living in adultery with the plaintiff's husband.

An action of this kind brought by a woman against one of her own sex must be said to be still somewhat of a novelty and an experiment in litigation in the Courts of this country, although in the case of *Quick v. Church*, 23 O. R. 262, it has been held to be maintainable, and the Divisional Court, in affirming the judgment of Robertson, J., at the trial, simply followed their former decision.

? | The action of the husband against the adulterer is one which has always been regarded as a blot upon English jurisprudence and social manners, and it cannot but be regretted if it shall appear that one result of the emancipation of the modern woman is to confer upon her the right to maintain a corresponding action against the adulteress. The damages in such an action are more strictly of a sentimental character than are those recoverable in the husband's action, since the husband's misconduct cannot deprive the wife of her right to be supported by him, a right she may enforce by civil or criminal proceedings, and this although he no longer acquires by the marriage any interest in her property.

The question then to be determined is whether on the pleadings or evidence any cause of action is shewn.

The evidence may be fairly summarized thus : That the husband while living with his wife got into the habit of neglecting her society and of visiting the defendant ; that he committed adultery with the defendant on at least one occasion, and that he finally deserted his wife and ceased to support her, this being fairly attributable to the fact that his affections had become alienated from her by his misconduct with the defendant. There is no reason to suppose that he ever resided with the defendant, or applied his earnings towards her support. He seems, indeed, to have become a worthless object hardly capable of supporting himself.

Judgment.

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OSLER,  
J.A.

The first part of the statement of claim, pars. 1 to 6 inclusive, if setting forth a claim under similar circumstances by a husband against another man in respect of his wife, would shew no cause of action. Adultery between the defendant and the plaintiff's husband is not charged therein, and the case was so treated at the trial ; the jury having been told that it had two branches, one for the alienation of the husband's affections, the other for the actual adultery, and damages were assessed separately for each. The declaration in the action for criminal conversation, whether framed in trespass or in case—and it might be indifferently in either, though it was considered as more properly in trespass, the law supposing that the wife had no power to consent (Selwyn's N. P., 9th ed., p. 9 ; 1 Stephen's N. P., p. 6 ; Chitty on Pleading, vol. 2, pp. 642 (n), 856, vol. 1, pp. 134, 167 ; *Chamberlain v. Hazlewood*, 5 M. & W. at p. 517)—always alleged that the defendant debauched and carnally knew the plaintiff's wife. The alienation of the wife's affections was mere matter of aggravation and the loss of the wife's *consortium* the necessary consequence of the injury even though she continued to live with her husband. The latter could even maintain the action against a man who committed adultery with the wife after she had obtained a decree of divorce *a mensâ et thoro*.

It was essential (and sufficient) to prove the mere fact of the adultery, and if not proved presumptively or directly,

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the plaintiff failed. A husband might also maintain an action against one who "persuaded, procured and enticed his wife to continue absent and apart from him, and to secrete, hide and conceal herself from him, whereby during the time she continued absent he lost her comfort and society and her aid and assistance in his domestic affairs," and also for "receiving her and unlawfully harbouring, concealing and secreting her from him, and refusing to deliver her to him": *Winsmore v. Greenbank*, Willes 577; *Metcalf v. Roberts*, 23 O. R. 130. See, however, *Regina v. Jackson*, [1891] 1 Q. B. 671. These were not actions for criminal conversation, and in them it was not necessary to allege adultery in order to entitle the plaintiff to recover. The statement of claim here sets forth no cause of action of that kind, and adultery not being charged in the paragraphs I have referred to, they would appear to disclose no cause of action, there being nothing to cause the loss of the husband's *consortium*, assuming that the loss thereof might be the foundation of an action by the wife. The loss of a wife's affections not brought about by some act on the defendant's part which necessarily caused or involved the loss of her *consortium*, never gave a cause of action to the husband. His wife might permit an admirer to pay her attentions, frequent her society, visit at her home, spend his money upon her, and by such means alienate her affections from him, resulting even in her refusal to live with him, and, so far as she could bring it about, in the breaking up of his home, and yet, there being no adultery and no "procuring and enticing," or "harbouring and secreting" of the wife, no action lay at the suit of the husband against the man. A wife can be in no better position to maintain an action against a woman guilty of similar conduct towards her husband.

So far, therefore, as the first branch of the case is concerned, I am clearly of opinion that the action cannot be supported.

Then, as to the adultery of the defendant with the plaintiff's husband.

The principle of the English law is the complete union of the wife with the husband. That, I think, is still her matrimonial status, except in so far as it may have been affected by the provisions of the Married Woman's Property Act of 1884, 47 Vict. ch. 19 (O.), R. S. O. ch. 132. Section 2 of our Act of 1884 was a transcript of the corresponding section of the English Act of 1882. In the revision a slight change of expression occurs not affecting the sense. The wife is declared to be capable of suing and being sued "in all respects," instead of (as in the original Act) "either in contract or in tort or otherwise": *Spahr v. Bean*, 18 O. R. 70.

Judgment.

OSLER,  
J. A.

I cannot regard the Act as extending to confer such a right of action upon the wife as is here sought to be enforced. It does not, except in specified cases and in qualified terms, create any new right of action in her. As is pointed out by a recent writer, "the change effected by the Act is limited to a married woman's proprietary rights and to these alone": Eversley's Law of Domestic Relations, 2nd ed., p. 361.

"The Act confers in certain specified cases new powers upon the wife, and in others new powers upon the husband, and gives them in certain specified cases new remedies against one another. But I see no reason for supposing that the Act does anything more than it professes to do, or either abrogates or infringes upon any existing principles or rules of law in cases to which its provisions do not apply": per Wills, J., in *Butler v. Butler*, 14 Q. B. D. at p. 836, cited with approval by Kay, J., in *In re Jupp, Jupp v. Buckwell*, 39 Ch. D. 148.

In Buller's N. P., 26a (1817), treating of adultery as a cause of action, it is said: "The action lies in this case for the injury done to the husband in alienating his wife's affections; destroying the comfort he had from her company; and raising children for him to support and provide for." To the same effect is 1 Stephen's N. P., p. 6, and in 2 Roper's Husband and Wife, 2nd ed., p. 322: "Actions of this description are founded on the injury which the

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J. A.

husband has sustained in the deprivation of the comfort, society, and assistance of his wife. This is the principle."

All the books treat of the action as one peculiar to the husband.

"Adultery at the present day, as far as respects the temporal Courts, is considered merely as a civil injury; and the only remedy which the law affords is an action, whereby the husband may recover against the adulterer a compensation in damages, for the loss of the society, comforts, and assistance of his wife, in consequence of the adultery. The right to maintain an action against an adulterer belongs only to the husband": Shelford's Law of Marriage and Divorce, p. 387. See also the remarks of Lord Eldon, quoted at p. 395.

The husband sued alone for a battery of his wife, *per quod consortium amisit*: Comyn's Dig. Baron and Feme, (W.); Bacon's Abr., Baron and Feme, (K.), p. 732. No such action was ever known at the instance of husband and wife for a similar injury to the wife arising from the battery of her husband, or his malicious prosecution or false imprisonment. Nor, if such acts, or the husband's adultery and desertion, gave rise to a cause of action, which was personal to the wife and would therefore survive to her, was it ever known that she maintained such an action, either during her husband's lifetime (which, if the injury to her was the meritorious cause of action and her coverture was not pleaded in abatement, she might have done), or after her husband's death, for the injury sustained by the loss of *consortium* in his lifetime. For the adultery she might, no doubt, discipline her rival in the Ecclesiastical Court: *Chamberlaine v. Hewson*, 5 Mod. 70; but even there the delinquent husband might leave her with but a barren victory by releasing his paramour from the costs.

The difficulty in her way was not one of procedure merely. It was inherent, as I think, in the relation of husband and wife—in the matrimonial status, and is thus stated by Chitty in the Treatise on Pleading, vol. 1, p. 72: "The wife having no legal interest in the person or property of

her husband cannot in general join with him in any action for an injury to them." See also Blackstone's Commentaries, Kerr's ed., vol. 3, p. 131, sub-tit., "injuries to relative rights."

Judgment.

OSLER,  
J.A.

We may say with Lord Wensleydale, in *Lynch v. Knight*, 8 Jur. N. S. at p. 731, that it is certainly an objection of the greatest weight to such an action as this that there is no precedent or authority for it. Nor is it without significance as shewing that the action for adultery was considered in its essence as peculiar to the husband that when by the Matrimonial Causes Act, 1857, 20-21 Vict. ch. 85 (Imp.), the action for criminal conversation was in form abolished in England, the husband was still permitted to claim damages against the alleged adulterer in his petition for dissolution of the marriage, or he might petition against him for damages only: *Pomero v. Pomero*, 10 P. D. 174. No corresponding right was conferred upon the wife to claim damages from her husband's paramour, nor could the latter except upon her own application be made a party to the wife's suit. No one indeed can read the debates which took place in Parliament when the Act referred to was under consideration, without seeing what an essentially different position the wife was regarded as occupying in relation to this subject from her husband. Had she been regarded as having a cause of action at common law, dormant, if that can be supposed, and incapable of enforcement by reason of some rule of procedure as to the constitution of the action, or of the husband's right to receive any damages she could recover, it might have been thought that under the new system these difficulties ought to be removed. The inferiority of her matrimonial status was further emphasized by maintaining the husband's right to a divorce *a vinculo* for his wife's adultery merely, a relief which she could obtain only on proof of his incestuous adultery or of adultery coupled with cruelty or desertion.

I read the judgments of Lord Campbell, Lord Wensleydale and Lord Brougham in *Lynch v. Knight*, 8 Jur. N. S.

**Judgment.** 729, the two former probably the greatest common law-  
**OSLER,** yers of their time, as indicative of their opinion that the  
**J.A.** wife had no cause of action against her husband's paramour, and that, as Lord Campbell expressly says, by reason of the status of the wife as regards the husband.

I am of opinion, with all deference to the contrary view expressed in the case of *Quick v. Church*, 23 O. R. 262, that there was no legal right in the wife at common law to maintain such an action as the present, repressed or in abeyance by reason of the trammels of a technical procedure, and therefore the provisions of the Married Woman's Property Act cannot aid her in this respect, as they confer upon her no new right of action, and do not alter the status of the married woman or the relation of husband and wife further than is necessary to give effect to her rights of property. The cases of *Phillips v. Barnet*, 1 Q. B. D. 436; *Abbott v. Abbott*, (67 Me. 304) Woodruff's Cases on Domestic Relations, p. 181; *Campbell v. Campbell*, 25 C. P. 368; *Robinson v. Robinson*, 13 Times L. R. 564; *Weldon v. Winslow*, 13 Q. B. D. 784; and *In re Duke of Somerset*, 34 Ch. D. 465, may also be referred to.

I should add that I concur in the result of the observations of the learned Chief Justice of this Court upon the American cases, which seem to me to proceed upon the ground either that the married woman is not, in the several States from which they are cited, under the same disabilities as in the English law, or that those disabilities have by statute been removed.

For these reasons I am of opinion that the appeal should be allowed and the action dismissed.

MACLENNAN, J. A. :—

With great respect, I think the case of *Quick v. Church*, 23 O. R. 262, on the authority of which this case was decided, cannot be supported.

There are two questions: first, whether at common law, and before the Married Women's Property Acts, an action such as the present could be maintained; and second,

whether, if not, those Acts authorize such an action to be brought. I think the first question must be decided in the negative. It is familiar law that before the Married Women's Acts all actions for wrongs or injuries to a married woman during coverture had to be brought either by the husband alone, or by the husband and wife jointly, and that the recovery in either case became the property of the husband. Now it is hardly conceivable that under any system of civilized jurisprudence, the present plaintiff's husband would have been allowed to sue the defendant and to recover from her, for his own benefit, a large sum of money by way of damages because he had allowed himself to be enticed to commit adultery with her, and to neglect to support his wife. Such an action, and such a recovery, would shock all sense of justice and decency.

Judgment.  
MAULENNAN,  
J.A.

In *Phillips v. Barnet*, 1 Q. B. D. 436, it was held that, after divorce, a wife could not sue her former husband for an assault and battery committed during the coverture, upon the ground that the disability to sue during coverture did not arise from a difficulty as to parties, but from the fact that husband and wife are one person in the law. It follows from that decision that at common law the present plaintiff could have had no action for damages against her husband for the wrongs now complained of, even if the difficulty as to parties were out of the way. In that case all technical difficulty had been removed by the divorce. The cause of action was a real, substantial injury, yet no redress could be given, because the matter complained of had arisen between husband and wife.

*Lynch v. Knight*, 5 L. T. N. S. 291, 9 H. L. C. 577, was an action by husband and wife against a third person for slander of the wife, and the damage alleged was that the husband had in consequence refused to keep her and had sent her home, whereby she had lost the *consortium* of her husband. In that case, if there had been a recovery, the money would have belonged to the husband. But the Court thought that would have been no objection, for what he did in consequence of the defendant's slander was natural enough, and



**Judgment.** was not misconduct. But in that case two of the learned Judges in Ireland, and Lords Brougham and Wensleydale, **MACLENNAN,** in the House of Lords, thought that such an action could not be maintained, the latter resting his judgment expressly on that ground. The Lord Chancellor, Lord Campbell, was of opinion that even if such an action lay, and he was of opinion that it did, the alleged special damage was not made out. But even Lord Campbell said that the better opinion was that a wife could not maintain, or join in, an action for criminal conversation against the paramour of her husband who had seduced him, and the reason which he gives for that opinion shews that he thought she could not bring such an action even if the seduction was followed by loss of *consortium*. Lord Brougham agreed with this part of Lord Campbell's judgment, as did also Lord Wensleydale, who rested his decision upon still higher ground, namely, that a married woman could bring no action whatever founded upon loss of the *consortium* of her husband. I think, therefore, this case is a clear authority that such an action as the present could not be maintained at common law. It might well be conceived that an action of libel or slander, or for assault or imprisonment of a husband, whereby the wife was deprived of the *consortium*, would lie. There would be nothing anomalous that the husband should sue for and recover damages for the special injury to his wife in such cases, as well as for the injury to himself. But the case is different when it is said that a husband who has allowed himself to be seduced might or could recover for his own benefit large damages from his paramour, because he has deserted his wife.

In *Winsmore v. Greenbank*, Willes 577, it was held that a husband could maintain an action against a defendant who persuaded his wife, who had left him, not to return to him, although she was willing to do so. But there is no case of a similar action on behalf of a wife. If there were it would be a recovery of damages, for his own benefit, by a husband, for his own wrongful act. It is very significant that there is no case of such an action as the

present by a woman after the death of her husband. If such an action could be brought we should expect to find instances of it, for in such a case there would be no abatement of the cause of action by the husband's death. Judgment.  
MAGLENNAN,  
J.A.

I am, therefore, of opinion that no such action as the present existed, or could be brought, at common law.

The further question is whether the Married Women's Act has given such an action, and I am of opinion that it has not done so. The material sections of the Act, R. S. O. ch. 132, are secs. 2, 3 (2), 4 (4) and 14. Section 2 defines property to include a thing in action. Section 2 (2) enables a married woman to contract in respect of her separate property, to sue and be sued as if she were a *feme sole*, and provides that her husband need not be joined as plaintiff or defendant, and that any damages recovered shall be her separate property. Section 4 (4) enables her, in the absence of settlement, to hold her property free from the debts and control of her husband; and section 14 gives her, in her own name, against all persons, including her husband, the same remedies for the protection and security of her property as if it belonged to her as a *feme sole*, and except as aforesaid, no husband or wife shall be entitled to sue the other for a tort. Now, there is nothing whatever in these clauses which, by any plausibility, can be held to create a new cause of action, or one previously unknown to the law. Remedies are given to her for the protection and security of her property, but except as aforesaid, neither husband nor wife can sue the other for a tort. Not only, therefore, is there no action given to her against such a person as the defendant, for the alleged wrongs, but she could not even sue her husband for them or any of them. The several clauses of our Act are substantially the same as those of the English Act 45 & 46 Vict. ch. 75; and in a recent case, *Robinson v. Robinson*, 13 Times L. R. 564, it was conceded that that Act gave no support to an action of libel brought by a married woman against her husband, which, however, succeeded, by reason of the combined effect of the Divorce

**Judgment.** Act and the Married Woman's Act of 1895, 58 & 59 Vict. MACLENNAN, ch. 39.

J.A.

I am, therefore, of opinion that the appeal should be allowed, and that the action should be dismissed.

Moss, J. A., concurred.

*Appeal allowed.*

R. S. C.

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ANDERSON V. GRAND TRUNK R. W. CO.

*Railways—Trespass—Invitation—Negligence—51 Vict. ch. 29, sec. 256 (D.).*

The defendants were in the habit of selling tickets to, and allowing passengers to get off at, a crossing or junction, the only means of egress to the highway being through the enclosed lands of the company. A passenger after disembarking from the train which had carried him to the crossing, and while walking along the track from the crossing to the highway, was killed by a passing train which had not given the statutory warning when nearing the highway:—

*Held*, that he could not, under the circumstances, be looked upon as a trespasser; that the defendants were bound to use reasonable care towards him, and that, as there was some evidence of want of care, a verdict in favour of his representatives could not be interfered with.

Judgment of a Divisional Court, 27 O. R. 441, affirmed.

*Per* OSLER, J. A. :—Section 256 of the Railway Act, 51 Vict. ch. 29 (D.), cannot be invoked for the benefit of persons using the track.

**Statement.** THIS was an appeal by the defendants from the judgment of a Divisional Court [ARMOUR, C. J., FALCONBRIDGE, and STREET, JJ.], reported 27 O. R. 441.

The action was brought by the personal representatives of one William McKenzie to recover damages in respect of his death, caused, under the circumstances set out in the report below, by the defendants.

The appeal was argued before BURTON, C. J. O., BOYD, C., OSLER, and MACLENNAN, JJ. A., on the 7th of June, 1897.

*Osler*, Q. C., for the appellants.

Argument.

*Aylesworth*, Q. C., for the respondents.

The line of argument is indicated in the report below, and the authorities relied on are there mentioned.

November 9th, 1897.    BURTON, C. J. O. :—

There was a great deal of skirmishing at the trial as to the disposition to be made of the case at the close of the evidence, the defendants' counsel insisting that he was entitled to the ruling of the learned Judge that there was no breach of any duty on the part of the defendants, whilst the counsel for the plaintiff urged that certain facts should be passed upon by the jury, leaving the law upon those findings to be decided by a higher Court.

I incline myself to think that that might have been a more satisfactory way of disposing of the case, but the agreement finally arrived at, as I understand it, was that if the Court should be of opinion that there was any evidence which would entitle the plaintiff to have the case submitted to the jury, then the Court should be at liberty to enter judgment for the amount agreed on, \$3,000.

The learned Judge was of opinion that there was no question for the jury, and in one of the contingencies referred to, viz., that the deceased was a trespasser on the defendants' track, the defendants' counsel was running no risk in leaving the case in that way, if the learned trial Judge had continued of that opinion, and that view had been sustained by the full Court.

That Court, however, came to the conclusion, a conclusion fully warranted by the evidence, that the deceased was lawfully at the Lucan station, and being there was entitled to egress from it by the only available way open to him—along the railway track to the nearest highway.

It was in evidence that the company for a long period acquiesced without objection to passengers walking along the railway for the purpose of ingress and egress to and

Judgment. from the station, and that they were impliedly invited to  
BURTON, use the track for such purpose, and they could not be  
C.J.O. treated as trespassers under such circumstances.

If this was so, the responsibility of using reasonable care towards such persons devolved upon the company, and they were possibly bound to observe the provisions of section 256 of the Railway Act, 51 Vict. ch. 29 (D.), at all events they cannot invoke section 273 in their favour.

The difficulty I have felt in the case, there being no witnesses of the accident, is in saying that the deceased met with his death by reason of any negligent act on the part of the railway company. He was killed by coming in contact with the engine beyond question, and the Divisional Court have come to the conclusion that if he was lawfully upon the track the omission to sound the whistle, or ring the bell, as directed by section 256, was such an act of negligence as entitled the plaintiff to have the case submitted to the jury.

It appears to me to be a case very near the line. The onus was upon the plaintiff to prove not only negligence, but that that negligence was the immediate and proximate cause of the accident. If we are left to mere conjecture as to whether that omission was the *causa causans*, the cases shew that that is not sufficient, but we are now dealing with the judgment of the Divisional Court, and I am not prepared to say that they were wrong.

It was said in argument, that after the specific warning the deceased received he could not be treated otherwise than a trespasser, or as one using the track at his own risk, but that question is, in my opinion, not now before us, and that at all events, if relied on, was necessarily for the jury.

The question is, to my mind, one of so much nicety that I am unable to say that the conclusion arrived at is wrong, and I think we must dismiss the appeal.

BOYD, C., and MACLENNAN, J. A., concurred.

OSLER, J. A. :—

Judgment.

OSLER,  
J.A.

I understand that my learned brothers have agreed to affirm the judgment of the Divisional Court. My opinion, therefore, cannot affect the result. I do not formally differ, but I cannot avoid saying that I yield to their view with considerable doubt and hesitation. The plaintiff's right to recover must depend, I conceive, upon this, that the defendants had, to some extent, been in the practice of receiving and discharging passengers at a point on their line, the Lucan crossing, where they could not reach the nearest highway without walking upon and along the company's premises, viz., their right of way as enclosed by their fences, though it was not by reason of his knowledge of, or in reliance upon this, that the unfortunate deceased was there at the time in question. But could this justify persons in walking along the track, or in the absence of notice that some one was actually doing so, cast upon the defendants the duty of running their engines in other than the usual way? They would not, more than any other landowner, by whose license, invitation or permission, any one is crossing over his property, be justified in running him down or injuring him, if by the exercise of reasonable care they could avoid doing so. Is there evidence that they had reason to anticipate that any one would be actually using their track on this particular occasion, or that persons had been in the habit of doing so, so as to call for the exercise of special care or caution in the management of their trains at this point? I am not, I must say, at all satisfied of this. There is no evidence that the servants in charge of the freight train which killed the plaintiff's husband had any notice of his presence on the track, and the case depends entirely upon proof of the accident having been caused by breach of a duty cast upon defendants by reason of some permitted practice on their part, involving invitation, or permission, by them to persons to walk upon their track. The deceased did not leave the train which brought

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OSLER,  
J.A.

him from London at Lucan crossing because that was the point to which they had contracted to carry him, but because by reason of the storm that train could go no further, and because he was determined, no doubt for very pressing reasons, to get to Ailsa Craig as soon as he possibly could, by the nearest way he could possibly reach it.

It would rather seem, warned as he was to be on the lookout for a freight train, that the unfortunate man took the risk upon himself of all dangers arising from that source. With all deference to the Court below, I cannot agree that the 256th section of the Railway Act is applicable to such a case as this, so that non-compliance with its provisions would be any evidence of negligence, as seems to have been there regarded. That section requires warning to be given in the prescribed manner on approaching a highway crossing, and cannot be invoked, as it seems to me, for the benefit of persons using the company's track.

I refer to *Jones v. Grand Trunk R. W. Co.*, 18 S. C. R. 696, 16 A. R. 37; *Dublin, etc., R. W. Co. v. Slattery*, 3 App. Cas. 1155, *per* Lord Blackburn, at p. 1207; *Chenery v. Fitchburg R. W. Co.*, 160 Mass. 211; *Wabash R. W. Co. v. Jones*, 45 N. E. Rep. 50; *Byrne v. New York Central R. W. Co.*, 104 N. Y. 362.

*Appeal dismissed.*

R. S. C.

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## HARRISON V. PRENTICE.

*Seduction—Evidence—Presumption of Service—Loss of Service—R. S. O. ch. 58.*

The plaintiff's unmarried daughter was seduced by the defendant while at service in his family. There was no pregnancy, and only very slight physical disturbance:—

*Held, per OSLER, MACLENNAN, and MOSS, JJ. A. :—*

That under the Seduction Act, R. S. O. ch. 58, an action lies by the parent although the daughter may not have been living with him at the time of the seduction or subsequent illness.

That while mere illicit intercourse affords no ground of action, proof of illness or physical disturbance sufficient to have caused loss of service to the parent, if the girl had been living with the parent, is all that is necessary.

*Per OSLER and MOSS, JJ. A., MACLENNAN, J. A., dissenting, that the evidence fell short of that in this case.*

*Per BURTON, C. J. O.*—That while there is under the Act, in an action by the parent, an irrebuttable presumption of service, there is no presumption of loss of service to the parent, which must still be proved, and that the action failed.

*Kimball v. Smith*, 5 U. C. R. 32; *L'Esperance v. Duchene*, 7 U. C. R. 146; *Westcott v. Powell*, 2 E. & A. 525; and *Cole v. Hubble*, 26 O. R. 279, considered.

In the result the judgment of ROSE, J., 28 O. R. 140, was affirmed, MACLENNAN, J. A., dissenting.

THIS was an appeal by the plaintiff from the judgment of ROSE, J., reported 28 O. R. 140. Statement.

The plaintiff brought the action to recover damages for the seduction of his unmarried daughter, who, at the time of the seduction, was at service in the family of the seducer. Pregnancy did not result, and there was no sickness. The girl stated, however, that after the illicit intercourse she was tired and less able to perform her household duties.

ROSE, J., dismissed the action, and the appeal from his judgment was argued before BURTON, C. J. O., OSLER, MACLENNAN, and MOSS, JJ. A., on the 27th of September, 1897.

*E. Guss Porter*, for the appellant. An action for seduction will lie although pregnancy may not result. There is a statutory presumption of the relationship of master and servant, and a statutory presumption of loss of service. The wrong is the same, though the resulting damage is less where pregnancy does not occur. *Kimball v. Smith*, 5 U. C. R. 32, went off on the question of pater-



**Argument.** nity. In *L'Esperance v. Duchene*, 7 U. C. R. 146, the question was whether the action was brought too soon. The American authorities are in the plaintiff's favour. See, for instance, *White v. Nellis*, 31 Barb. 279.

*W. B. Northrup*, for the respondent. Before the Act three things had to be proved, namely, service, or the right to service; seduction; and loss of service. It is only the first essential that is under the Act to be presumed. Here there is no loss of service, and there can be no recovery. Seduction in itself is not actionable. The American authorities go further, perhaps, than the English and Canadian ones, but in all of them there was evidence of some illness or incapacity. There is nothing of that kind here.

*E. Guss Porter*, in reply.

November 9th, 1897. BURTON, C. J. O.:—

The question resolves itself into one of law, and the construction of a statute (R. S. O. ch. 58) which has been found somewhat difficult of interpretation, and which has caused considerable difference of judicial opinion.

Section 2 dispenses with the giving of evidence of actual service, and places the father in that respect in the same position as if under the old form of pleading the allegation of service had not been traversed, and this statutory presumption is an irrebuttable one—no proof to the contrary being admissible—and the general concurrence of the Judges in all the cases has been that the effect of this section is to put the right of maintaining the action by a parent without proving acts of service on the same footing as that of a master who has proved the party seduced to be actually his servant.

But the point on which serious differences of opinion have arisen is, whether the enactment has had the effect of superseding the necessity of proving the loss of service as a consequence of the wrongful act of the defendant.

I am not aware that any decision in our Courts goes the length of holding that proof of this is not necessary.

In *Kimball v. Smith*, 5 U. C. R. 32, it is said that the Act places the plaintiff in the same position as he would be in after the relation of master and servant had been established in evidence, and in commenting on that case, Draper, J., in *L'Esperance v. Duchene*, 7 U. C. R. 146, says: "To refuse a defendant permission to give evidence to disprove acts of service, and thereby to disprove the relation of master and servant, is one thing; but to refuse to permit him to disprove loss of service, to me appears a totally different matter, and one to which this Act was never meant to extend. Equally different is it, to presume acts of service to the parent, for the purpose of clothing him with the right of action as master, and to presume loss of service or consequential damage. These two clauses do not, in my opinion, put the right of action on any new or different footing, or enable a plaintiff to maintain it in any new or different character, from what was by law established before, viz., on the footing of service by the seduced, or the character of master by the plaintiff. And therefore it is not, in my humble judgment, rendered less necessary by these clauses for the plaintiff to prove a wrongful act by the defendant, from which the plaintiff has sustained loss of service, and not merely a wrongful act by the defendant, which would occasion a loss of service, without also shewing the plaintiff to be the person by whom that loss of service is sustained."

Judgment.

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BURTON,  
C.J.O.

He refers also to *Eager v. Grimwood*, 1 Exch. 61. There only "not guilty" was pleaded—the relation of master and servant being thereby admitted—and if was contended that the declaration would have been good if it had only been stated that the defendant debauched the plaintiff's servant, for in such case the law would imply damage. But Alderson, B., replied, that according to that argument if it appeared that the party seduced was in the service of a third person, the plaintiff would be entitled to a verdict. And the learned Chief Justice contended that the same answer applied here, for though the first section enables the parent to bring an action where the daughter is resi-

**Judgment.****BURTON,  
C.J.O.**

dent with a third person, this is limited to her residence at the time of her seduction, and operates only as stated to establish incontrovertibly the relation of master and servant, and the plaintiff has still to prove, first, the wrongful act, and, secondly, the consequential injury.

That case, *L'Esperance v. Duchene*, 7 U. C. R. 146, is not easy to understand, unless upon the ground that leave was reserved at the trial to move for a nonsuit on the ground that no action would lie before the birth of the child, and the motion before the Court in banc was upon that point only.

The majority of the Court were of opinion that the action would lie, but there was apparently some misapprehension as to the facts.

The declaration contained the usual averment that the girl seduced was unable to do and perform the necessary affairs and business of the plaintiff, her father, who was forced to lay out and expend a large sum of money in nursing, etc.

It will be observed that in the statement of the facts it is only alleged that the young woman was living with a stranger at the time of her seduction, and it is only in the statement of the dissenting Judge that it appears that she continued to reside with that stranger until the trial.

The learned Chief Justice refers to the averment of the loss of service to the plaintiff, and after referring to the effect of the statute adds, "and it leaves the question of fact as to what would be an interruption of such service to rest on the same ground as it does in England."

But the learned Judge, I think, was under a misapprehension as to the facts, and was under the impression that the girl had returned home, and he then proceeds to say that the jury might well infer that the service would in some degree be interrupted by pregnancy, but the decision affords no countenance to the view that a loss of service by the stranger could give a cause of action to the father.

The statement in the declaration without an examination of the evidence, which was not necessary in the way

in which the case came before the Court, might well have misled the learned Chief Justice, inasmuch as it alleged the seduction of Susannah L'Esperance, then, from thence, and hitherto, being the daughter and servant of the plaintiff.

The leading case of *Westacott v. Powell*, 2 E. & A. 525, was a decision of the old Court of Error and Appeal, and although two of the Judges there held that it was not necessary now to prove loss of service, but that the fact of carnal connection was sufficient, that view was not entertained by a majority of the Court.

I have a very strong impression that reading the third in connection with the other two sections, the Court might well have held that an action was not maintainable under the statute until after the birth of a child. The decision arrived at was that pregnancy was sufficient under the statute as well as at common law to sustain the action; but upon the construction of the statute the majority of the Court were unanimous in holding that the only effect was to render it unnecessary to establish the relation of master and servant where the action is brought by the parent, but to place the law in this country in all other respects on the same footing as it was in England when the action is brought by the father, and the daughter resides with him.

No instance of an action being brought by the father where the girl seduced remained continuously with the seducer or a stranger can be referred to, and it would be strange if it could be. The plaintiff in this as in all other cases must recover *secundum allegata et probata*, and a statement of claim alleging the loss of service to be to the stranger would be manifestly bad, and it would be a great stretch of imagination to hold that the loss of service by the stranger or the payment of money by him could be regarded as loss of service or the payment of money by the father.

It is unnecessary to consider how far the facts relied on as loss of service would have been sufficient if the girl had been living with her father. I am aware what trifling

Judgment.

BURTON,  
C.J.O

**Judgment.** acts have been held sufficient, but what is alleged here  
**BURTON,** appears to be almost too trifling to be treated seriously in  
**C.J.O.** a court of justice. All that can be said is that the father did not suffer in consequence, and, in my opinion, failed to make out a cause of action under the statute.

OSLER, J. A. :—

This case turns, in my opinion, upon a very short point. *Westacott v. Powell*, 2 E. & A. 525, decides that an action for seduction may, the plaintiff's daughter being pregnant, be maintained before the birth of the child. So it was held in *L'Esperance v. Duchene*, 7 U. C. R. 146, and so it had been previously held in England. Our statute makes no difference in this respect. In this case the defendant simply had sexual intercourse with the plaintiff's daughter not followed by pregnancy. In England an action has been held to lie in such circumstances where serious illness was the consequence, interfering with the daughter's ability to do service : *Manvell v. Thomson*, 2 C. & P. 303. The disability is usually caused by the illness of pregnancy, but so long as it is caused by any illness traceable to the illicit intercourse, it may be thought, having regard to the foundation on which the action there specially rests, viz., the wrong done to a master by injuring his servant, that that would be enough.

There are to be found in our reports opinions of individual Judges, perhaps it may be said decisions, that in order to maintain an action by the father or mother under our statute, the seduction—sexual intercourse—must be followed by pregnancy, which is naturally attended by some degree of illness which causes the interruption or loss of service which has always been regarded as an essential ingredient of the action. That question was left undecided in *Westacott v. Powell*, 2 E. & A. 525, and in the view I take of this case it is not necessary to decide it now. There seems, however, nothing in the opinion of the majority of the Court, voiced by Richards, C. J., and

Hagarty, J., opposed to *Manvell v. Thomson*, 2 C. & P. 303. Judgment.

O'LEARY,  
J.A.

For the purpose of our statute the loss of service may be said to be almost as imaginary as the service. What has always been required to be proved is that some illness has followed the defendant's act which has affected or diminished the daughter's ability to serve. The object of the Legislature appears to have been to place the father or mother in the same situation as if the seduction and consequent illness and inability to serve had occurred at home. As Richards, C. J., observes in *Westacott v. Powell*, 2 E. & A. 525, at p. 528: "What the Legislature meant was simply to place the law in this country in all cases just where it is in England, when the action is brought by the father, and the daughter resides with him, and there is no plea denying that she is the plaintiff's servant."

Armour, C. J., in *Evans v. Watt*, 2 O. R. 166, at p. 171, while regarding pregnancy as essential, states the law as I have always understood it to have been held under the statute, viz., that the action may be maintained by the father, "although his daughter was living with the seducer as his hired servant at the time of her seduction, and she continued so to live with her seducer until after the birth of the child."

Macaulay, C. J., in *Lake v. Bemiss*, 4 C. P. 430, states the prevailing view more distinctly perhaps than it is elsewhere in terms found. He thinks the statute has virtually changed the nature of the action from one resting on the relation of master and servant to that of parent and child, and in effect to entitle the latter to an action for seduction of his or her child, "except that it somewhat inconsistently requires proof that such seduction led to consequences that would have established loss of service in an action founded on the relation of master and servant, although neither the relation of master and servant, nor the loss of service in fact, is required to be proved; but service being presumed, sickness and inability to serve would of course be evidence of and prove loss of service,

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OSLER,  
J.A.

presuming the relation of master and servant subsisting throughout, as did that of parent and child."

I am not aware that it has ever been held that a real loss of service to the father must be proved, that is to say, that the daughter must have been resident with him when her illness occurred. That would practically be to make the statute inapplicable to many of the very cases to provide for which it was passed, and to call for the construction which Spragge, C., and Wilson, J., placed upon it in *Westacott v. Powell*, 2 E. & A. 525, viz., that nothing more than carnal intercourse need be proved, and that illness causing loss of service, or which, if the daughter was living at home, would cause it, is not essential.

Wilson, J., in the above case, considered that the decisions of the Courts had not been in accordance with that view. Certainly the opinions of the majority of the Court, and I may almost say the decision itself, are opposed to it. I say this because the evidence as reported in the appeal case shews that it was one in which the daughter was living away from home, residing with her uncle, and there was no question of a real loss of service to the father. The case was treated as one in which there was illness—pregnancy—causing a disability to serve, the loss of service which would be occasioned thereby being as it were imputed as the father's. On the facts the case was similar in this respect to *L'Esperance v. Duchene*, where the girl seduced had never resided with her father since her infancy.

In the present case the plaintiff has been nonsuited. I treat it just as if the daughter had been living with the father instead of with the uncle. All that is proved is that the defendant had sexual intercourse with her. I think there was no evidence of illness proper to be submitted to the jury. In no respect does the case in this respect come near that of *Manvell v. Thomson*, 2 C. & P. 303. It seems almost ludicrous to speak of the languor which the young woman says she experienced as an illness causing a disability to serve, etc., and on this ground only I affirm the judgment and dismiss the appeal.

MOSS, J. A. :—

Judgment.

I agree, for the reasons stated by my brother Osler, that this appeal should be dismissed.

Moss,  
J.A.

MACLENNAN, J. A. :—

I am of opinion that this appeal should be allowed, and that there should be judgment for the plaintiff for the damages assessed by the jury.

Although not absolutely binding upon the Court, inasmuch as the decision of the point was not necessary in that case, I think the opinion of the majority of the Court in *Westacott v. Powell*, 2 E. & A. 525, should be adopted as the true construction of the Seduction Act, that when the action is brought by the father or mother it is still necessary to prove some sickness or injury sufficient to interfere with the service which is presumed to be due to the father or mother.

I think, too, with great respect, that the learned Judge was wrong in holding that no action lies for seduction unless pregnancy is the result. I think the cases in which that has been said or decided are to that extent not correct statements of the law. In most of the reported cases there was pregnancy, and the allegation is found in the forms of pleading to be found in the books. Whenever the principle of the action has been discussed, it has been held to be loss of service resulting from the act of seduction. It is a master's action in respect of his servant, and is of a similar character to that for enticing a servant away from his master. It is no concern of the master or mistress whether pregnancy has ensued or not, unless there be loss of service. If there has been no loss of service then even pregnancy or the birth of a child is not sufficient to support the action, as where before the pregnancy or birth the daughter has left the home and service of her parents.

In the earliest case in our Courts of *Kimball v. Smith*, 5 U. C. R. 32, cited by my brother Rose in his judgment,



**Judgment.** Jones, J., said: "It is certain that pregnancy does not always follow seduction, but I see no case, nor have I heard of any other than the present, where an action for seduction was attempted to be supported where pregnancy was not proved to be the consequence." That was in 1849, but in 1826, in *Manvell v. Thomson*, 2 C. & P. 303, Abbott, C.J., at *Nisi Prius*, upheld an action in which there was no pretence of pregnancy, and in which the evidence of loss of service was that the girl was, after the occurrence, in a state of great agitation, and continued so for some time; that she received medical attendance, and was obliged to be watched lest she should do herself some injury. In that case, Denman, who had then been twenty years at the bar, and a few years afterwards was Lord Chief Justice of England, was for the defendant, and made no objection that pregnancy was not shewn. I agree entirely with what is said on this point by Meredith, J., in *Cole v. Hubble*, 26 O. R. 279.

It was also contended by Mr. Northrup that there was no evidence of loss of service in the present case. It was certainly very slight, but it has often been said that very slight evidence will do. The Legislature has in effect said there need not be any service, that it must in all cases be presumed, and no evidence shall be received to the contrary, and we cannot shut our eyes to the fact that the act of seduction is what the Legislature deemed to be the wrong for which it intended to enlarge the remedy. Therefore, I think, while some evidence of interference with the ability to render service must be adduced, very slight evidence will do. There was some evidence of that here, and the learned Judge who tried the case thought at the trial, and afterwards, when preparing his judgment, continued to think, the evidence sufficient to lay before the jury. I cannot say that he was wrong, and the jury having found for the plaintiff, I think the verdict should stand, and that the plaintiff should have judgment.

*Appeal dismissed, MACLENNAN, J. A., dissenting.*

R. & C.

## GROSS V. BRODRICHT.

*Evidence—Indecent Assault—Evidence of Reputation—Evidence of Specific Acts of Impropriety.*

In an action for damages for indecent assault evidence of the general reputation for unchastity of the plaintiff is admissible, but evidence of specific acts of impropriety is not.

Judgment of ROBERTSON, J., reversed.

THIS was an appeal by the defendant from the judgment of ROBERTSON, J. Statement.

The action was brought to recover damages for alleged indecent assault, and was tried at Stratford, at the Autumn Assizes of 1896, before ROBERTSON, J., and a jury, when a verdict of \$800 in the plaintiff's favour was given, and judgment was entered for that sum.

The appeal was argued before BURTON, C. J. O., OSLER, MACLENNAN, and MOSS, JJ. A., on the 20th and 21st of September, 1897.

*Idington, Q. C.*, for the appellant.

*J. P. Mabee*, for the respondent.

Several objections to the charge of the learned Judge and to the reception and rejection of evidence were urged by the appellant, but it is unnecessary to set them out.

November 9th, 1897. The judgment of the Court was delivered by

OSLER, J. A. :—

In my opinion this case ought to be submitted to another jury. The evidence looked at in the most favourable way for the plaintiff, was very evenly balanced, and called for the most careful and temperate consideration of the jury. It is difficult to believe, looking at the course pursued throughout the trial, that the jury can have approached

Judgment.

OSLER,  
J.A.

or performed their duty in this spirit. It is unnecessary to particularize as the circumstances which were regarded as objectionable and calculated to impress the jury in a manner of which the defendant might justly complain were pointed out during the argument. I have considered the case of *Dougherty v. Williams*, 32 U. C. R. 215, and similar cases, but do not find them of any assistance in dealing with the case in hand. The observations of Harrison, C. J., in *McCreary v. Grundy*, 39 U. C. R. 316, may be referred to.

As the case must go before another jury, I refrain from commenting upon the evidence further than is necessary to dispose of some of the questions which were raised as to its admissibility, and of the defendant's contention as to the proof of what he called his *alibi*. The action is for an indecent assault with intent to have connection with the plaintiff, an unmarried woman, and the defendant insisted that he had the right to hold her to proof of its commission on the precise day alleged in the statement of claim, on which day he was able to shew by proof of his actual whereabouts that it could not have taken place. In this I think he was wrong. The evidence was of course admissible for whatever it was worth, but it did not entitle the plaintiff to a verdict if the jury thought the assault occurred on another day, for the plaintiff not having been fastened by particulars to any precise day, the allegation of time was immaterial, and the defendant, moreover, had notice from the plaintiff's examination before trial that she charged the assault as having occurred on or about the day stated in the claim, and was not confining it to the particular day therein mentioned.

I think the defendant had the right to prove as against the plaintiff's denial, that he had driven her in his buggy on an occasion long prior to the time at which she fixed the assault as having taken place, that being as he averred the only time on which he had done so. This was evidence proper to be submitted to the jury in connection with all the circumstances of the case, and the let-

ter said to have been written by or on behalf of the plaintiff in support of the defendant's contention that the whole charge was a mere fabrication or attempt to blackmail him. Even if the jury should be of opinion that something of the kind complained of took place on the occasion referred to by the defendant they might regard the case very differently from the standpoint of damages and the inference to be drawn from delay in making the charge. This evidence was, however, practically withdrawn by the learned Judge from the consideration of the jury.

The only other point which calls for observation is whether the evidence offered with respect to character was admissible. This was of two kinds: (1) as to the plaintiff's general reputation for chastity; and (2) as to specific acts of unchastity or lewdness of which she was said to have been guilty previous to the alleged assault.

The authorities bearing upon the question in an action of this kind are singularly meagre. In the English text books and reports I have found no reference to any similar case. In criminal charges arising out of such an assault it is well settled that, while evidence of the general reputation of the prosecutrix for chastity is admissible as bearing upon the question of consent, yet that evidence of specific acts of lewdness and unchastity with men other than the prisoner is not. She may be asked as to them, but cannot be compelled to answer, and if she denies them cannot be contradicted: *Regina v. Holmes*, L. R. 1 C. C. R. 334; *Laliberté v. The Queen*, 1 S. C. R. 117. In proceedings of that kind such evidence is rejected because it is not relevant to the issue, going merely to the credit of the prosecutrix, since the mere fact of her having had connection with other men can be no defence to the charge of rape or indecent assault by the prisoner. In civil cases evidence of character is offered with a different object, viz., in mitigation of the damages and the question whether it is to any extent admissible seems to depend upon whether the particular action is one in which the character of the plaintiff for

Judgment.

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OBER,  
J. A.

**Judgment.**

**ONLINE,  
J.A.**

chastity can be said to be in issue: Taylor on Evidence, 9th ed., sec. 356; Best on Evidence, 8th ed., secs. 257, 258.

Probably that would be so in a case like the present just as it is upon the criminal charge, and it would besides, to some extent, enter into the question of damages, regarding the assault as an insult to and attempted outrage upon the plaintiff's chastity. To a pure and modest woman such an assault would be a far graver injury as a shock to her feelings, and causing pain and grief of mind, than it would be to one accustomed to "give occasion welcome ere it comes."

I have examined a large number of cases as well as the text books bearing on the subject without finding anything in our own or the English reports more nearly in point as enunciating a principle than *Scott v. Sampson*, 8 Q. B. D. 491. That was an action for defamation, and the Court, after a full discussion of the authorities held that evidence of general reputation was admissible, but that evidence of specific acts, that is, that the plaintiff had been in the habit of committing offences of the like kind to those alleged in the libel, was not. On the whole it appears to me that this case suggests the safest and most reasonable rule to apply in an action like the present, namely, that evidence of the plaintiff's general bad reputation for chastity is admissible, but that evidence of previous specific acts of impropriety is not, and that partly for the reason mentioned in *Scott v. Sampson*, that to admit it is in effect to throw upon the plaintiff the difficulty of shewing a uniform propriety of conduct during her whole life, and partly because it would give rise to interminable issues which could have but a slight bearing upon the question in dispute. Moreover, it ought not to be open to a defendant to urge that the woman he had insulted had formerly made a slip in her conduct, though she might have recovered herself and have been living as a modest and virtuous woman. Certainly the course taken at the trial of this action, and the difficulties which arose from the admission of the evidence as to specific acts, ought

to lead to its rejection in the absence of clear authority in favour of its admissibility. Judgment.

OSLER,  
J.A.

There may be a clear distinction between its admissibility in a case like the present, and in an action by a father for the seduction of his daughter, or by a husband for criminal conversation, in which it appears to be laid down that such evidence may be given.

In some of the American Courts decisions are to be found in favour of the admissibility of the evidence: see *Ford v. Jones*, 62 Barb. 484 (1871); *Gulerette v. McKinley*, 27 Hun 321 (1882); *Young v. Johnson*, 123 N.Y. 226 (1890); *Mitchell v. Work*, 13 Rhode Island 645.

Cases in support of the opposite view are not wanting: *Gore v. Curtis*, 81 Me. 403 (1889); *Am. & Eng. Encycl. of Law*, 2nd ed., vol. 2, p. 999.

I refer also to Stephen's Digest of the Law of Evidence, 2nd Am. ed., art. 57; 4th Eng. ed., [1893] art. 57; Greenleaf on Evidence, 16th ed., secs. 54, 55; *Jones v. Stevens*, 11 Price 265, 268; 1 Phillips's Law of Evidence, 10th ed., p. 504; 1 Sutherland on Damages, 2nd ed., p. 319, sec. 163; p. 2685 *et seq.*, sec. 1255; 2 Sedgwick on Damages, 8th ed., secs. 487, 488; *Verry v. Watkins*, 7 C. & P. 308; *McCreary v. Grundy*, 39 U. C. R. 316; Mayne's Law of Damages, 4th ed., pp. 109, 460 *et seq.*; Buller's N. P. pp. 26 (b), 295 (a).

In the result the appeal should, in my opinion, be allowed, without costs of the trial or of the appeal to either party, and a new trial granted without costs.

*Appeal allowed.*

R. S. C.

END OF VOL. XXIV.



## APPENDIX.

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Cases reported in the Ontario Appeal Reports, disposed of by the Judicial Committee of the Privy Council and by the Supreme Court of Canada since the publication of volume 23, up to December 31st, 1897.

### JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

FLEMING V. LONDON AND LANCASHIRE LIFE ASSURANCE Co., 23 A. R. 666.—Appeal allowed; August 3rd, 1897: [1897] A. C. 499.

IN RE QUEEN'S COUNSEL, 23 A. R. 792.—Appeal dismissed; December 8th, 1897.

REGINA V. HALLIDAY, 21 A. R. 42.—Followed by the Court of Appeal in IN RE BREWERS AND DISTILLERS' LICENSES, January 14th, 1896; and appeal from that decision dismissed; February 6th, 1897.

### SUPREME COURT OF CANADA.

BLAKELY V. GOULD, 24 A. R. 153.—Appeal dismissed; November 10th, 1897: 27 S. C. R. 682.

BROUGHTON V. TOWNSHIP OF GREY, 23 A. R. 601.—Appeal allowed; May 1st, 1897: 27 S. C. R. 495.

CAMPBELL V. MORRISON, 24 A. R. 224.—Appeal dismissed; December 9th, 1897: *sub nom.* MALONEY V. CAMPBELL.

IN RE CENTRAL BANK OF CANADA—HOGABOOM'S CASE, 24 A. R. 470.—Appeal dismissed; December 9th, 1897.



CONSUMERS' GAS CO. OF TORONTO V. CITY OF TORONTO, 23 A. R. 551.—Appeal dismissed; May 1st, 1897: 27 S. C. R. 453.

DAVIDSON V. FRASER, 23 A. R. 439.—Appeal dismissed; May 1st, 1897.

DRENNAN V. CITY OF KINGSTON, 23 A. R. 406.—Appeal dismissed; January 25th, 1897: 27 S. C. R. 46.

IN RE FERGUSON, BENNETT V. COATSWORTH, 24 A. R. 61.—Appeal dismissed; November 10th, 1897.

HALSTED V. BANK OF HAMILTON, 24 A. R. 152.—Appeal dismissed; December 9th, 1897.

JAMIESON V. LONDON AND CANADIAN LOAN AND AGENCY Co., 23 A. R. 602.—Appeal allowed; May 1st, 1897: 27 S. C. R. 435.

MAY V. LOGIE, 23 A. R. 785.—Appeal dismissed; May 1st, 1897: 27 S. C. R. 443.

ROGERS V. TORONTO SCHOOL BOARD, 23 A. R. 597.—Appeal dismissed; May 1st, 1897: 27 S. C. R. 448.

THOMPSON V. SMITH, 23 A. R. 29.—Appeal dismissed; June 15th, 1897: 27 S. C. R. 628.

WASHINGTON V. GRAND TRUNK RAILWAY CO. OF CANADA, 24 A. R. 183.—Appeal allowed; December 9th, 1897.

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**A DIGEST**  
**OF**  
**ALL THE CASES REPORTED IN THIS VOLUME,**  
**BEING DECISIONS IN THE**  
**COURT OF APPEAL FOR ONTARIO.**

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**ABATEMENT.**

*See* WILL, 3.

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**ACCOUNTS.**

*See* EXECUTORS AND ADMINISTRATORS, 1.

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**ADMINISTRATION.**

*See* CROWN—EXECUTORS AND ADMINISTRATORS—PARTNERSHIP.

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**ADULTERY.**

*See* HUSBAND AND WIFE, 4.

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**AFFIDAVIT OF BONA FIDES.**

*See* BILLS OF SALE AND CHATTEL MORTGAGES.

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**ALTERATION OF NOTE.**

*See* BILLS OF EXCHANGE AND PROMISSORY NOTES.

**APPEAL.**

*Interim Injunction—Contempt—Practice—Ex parte Motion—Parliamentary Elections—Recount—Jurisdiction of High Court.]*—Where, after the expiration by effluxion of time of an interim injunction order, proceedings are taken against a party to the action to commit him for contempt for disobeying the order, an appeal by him against the interim order will lie; BURTON, C. J. O., dissenting.

A Judge of the High Court has no jurisdiction to restrain by injunction a County Court Judge and Returning Officer from holding a recount of the ballots cast at an election for the House of Commons; BURTON, C. J. O., expressing no opinion on this point.

*In re Centre Wellington*, 44 U. C. R. 132; *Re North Perth*, *Hessin v. Lloyd*, 21 O. R. 538, considered.

Where an injunction is being applied for *ex parte* counsel who desire to appear in opposition to the application should be heard.

Judgment of ROBERTSON, J., reversed. *McLeod v. Noble*, 459.

*See* WAY.

**ARBITRATION AND AWARD.**

*Voluntary Submission—Motion to Set Aside Award—Time—52 Vict. ch. 13 (O.).*—A motion to set aside an award made under a voluntary submission must be made before the expiration of the term next after publication of the award, even if three months have not expired.

*In re Prittie and Toronto*, 19 A. R. 503, considered.

Construction of 52 Vict. ch. 13 (O.), discussed.

Remarks as to the necessity of revision of the legislation as to arbitrations.

Judgment of ARMOUR, C. J., affirmed. *In re Caughell and Brower*, 142.

**ASSIGNMENT.**

*See CHOSE IN ACTION.*

**ASSIGNMENTS AND PREFERENCES.**

*See BANKRUPTCY AND INSOLVENCY.*

**BANKRUPTCY AND INSOLVENCY.**

1. *Agreement to Give Chattel Mortgage—Bills of Sale and Chattel Mortgages—Change in Statute Law—Registration of Agreement—59 Vict. ch. 34 (O.).*—An unregistered agreement by a debtor to give to his creditor upon default in payment, or upon demand, a chattel mortgage upon his "present and future goods and chattels" confers no title upon the creditor as against the debtor's assignee for the benefit of creditors, who takes possession before a chattel mortgage is given.

*Kerry v. James*, 21 A. R. 338, considered.

Judgment of ROSE, J., affirmed.

After judgment in the assignee's favour the Act 59 Vict. ch. 34 (O.) was passed, and the agreement in question was registered:—

*Held*, that this did not validate it. *Hope v. May*, 16.

2. *Pressure—Security—R. S. O. ch. 124, sec. 3, sub-sec. 3—Sec. 19, sub-sec. 4—Practice—Parties.*—

The doctrine of pressure may still be invoked in order to uphold a transaction impeached as a preference, when it is not attacked within sixty days, or when an assignment for the benefit of creditors is not made within that time.

*Per OSLER, J.A.*—The liability of the endorser of a promissory note made by the debtor held by the creditor for part of his debt is not a "valuable security" within the meaning of sub-section 3 of section 3 of R. S. O. ch. 124, and if such a note is given up by the creditor to the debtor in consideration of a transfer of goods impeached as a preference the liability cannot be "restored" or its value "made good" to the creditor or the endorser compelled to again endorse.

*Per OSLER, J.A.*—What is referred to in this sub-section is some property of the debtor which has been given up to him or of which he has had the benefit; some security upon which the creditor, if still the holder of it, would be bound to place a value under sub-section 4 of section 19 of R. S. O. ch. 124.

*Per OSLER, J.A.*—The debtor is not a proper party to an action by his assignee against a creditor to set aside a preferential transfer.

Judgment of the Divisional Court reversed. *Beattie v. Wenger*, 72.

3. *Assignee's Commission and Expenses*—*Deputy Resident out of Ontario*—*R. S. O. ch. 124, sec. 3, sub-sec. 6.*—Where an assignment for the benefit of creditors is made by a resident of Ontario to an assignee residing in Ontario, but all the work in connection with the assignment is done by the assignee's partner residing out of the Province, the assignee cannot recover as against the assignor or retain out of his estate any commission or expenses.

Judgment of ROBERTSON, J., affirmed. *Tennant v. Macewan*, 132.

4. *Transfer of Unearned Profits.*—An assignment by way of security of the profit expected to be made out of a contract to do work does not come within the Act respecting Assignments and Preferences and cannot be set aside under that Act.

Judgment of STREET, J., affirmed on other grounds. *Blakely v. Gould*, 153.

5. *Chattel Mortgage given within Sixty Days Pursuant to Agreement given Prior to Sixty Days from Assignment*—*Statutory Presumption of Fraudulent Intent*—54 Vict. ch. 20 (O.).—Certain creditors, believing their debtor to be insolvent, but not desiring by taking a chattel mortgage to bring down upon him his other creditors, procured from him an agreement in writing to give, on default of payment or on demand, a chattel mortgage to secure the debt. About four months after, pursuant to the agreement, the debtor gave a chattel mortgage, within sixty days from the date of which he made an assignment for the benefit of his creditors:—

Held, that notwithstanding the agreement, the Act 54 Vict. ch. 20

(O.), amending the Act relating to fraudulent preference by insolvent persons, applied, that the doctrine of pressure was not applicable, and that the fraudulent intent must be presumed. *Breeze v. Knox et al.*, 203.

6. *Fraudulent Preference*—*Previous Agreement*—*Threatened Action for Tort.*—One of the defendants, when threatened with an action on behalf of the plaintiff to recover damages for slander, conveyed his farm to his co-defendant, his son, the alleged consideration being the son's agreement, entered into several years before, to maintain the grantor and his wife for life. The plaintiff brought the threatened action and obtained judgment for damages and costs and then attacked the deed, and in that action it was proved that such an agreement had in good faith been made:—

Held, that the previous agreement, although not proved with sufficient clearness to have enabled either party to it to enforce specific performance, was an answer to the charge of fraud.

Judgment of a Divisional Court reversed. *Montgomery v. Corbit*, 311.

7. *Preference*—*Breach of Trust*—*Revocation of Transfer*—*Post Office Act*—*R. S. C. ch. 35, sec. 43.*—The transfer by the defaulting treasurer of a municipality to the bankers of the municipality of the accepted cheque of a third person for the amount due by him to the municipality cannot be impeached under the Assignments and Preferences Act, the duty to make good his wrong being sufficient to protect the transaction.

Judgment of FERGUSON, J., affirmed.

The cheque was sent by the treasurer by post in a letter to the bankers and this letter was received by the bankers in the afternoon, but the amount was not credited in the bank books to the municipality till next morning, and before this was done an assignment for the benefit of creditors had been made by the treasurer:—

*Held*, that the property passed as soon as the cheque reached the bankers and that the assignment was not a revocation of the transfer.

*Per* FERGUSON, J.—The property in the cheque passed irrevocably by virtue of the provisions of the Post Office Act, R. S. C. ch. 35, sec. 43, as soon as the letter was posted.

Judgment of FERGUSON, J., affirmed on other grounds. *Halwell v. Township of Wilmot*, 628.

*See* *Halsted v. Bank of Hamilton*, 152.

### BANKS.

*See* *Halsted v. Bank of Hamilton*, 152.

### BENEVOLENT SOCIETY.

*Rule Directing Payment to Named Beneficiaries — Certificate Payable to Assured's Executors—Rights of Creditors and Legatees—R. S. O. ch. 172.*—A certificate issued by a benevolent society incorporated under R. S. O. ch. 172 in favour of an unmarried man declared the sum therein mentioned to be payable to his executors. The rules of the society required the beneficiary to be named in the certificate, and in default provided for payment to certain named relations of the mem-

ber, or his next of kin, or to the beneficiary fund of the society:—

*Held*, that this was not a legal appointment or declaration of the fund under the statute and rules of the society, that the fund did not pass to the member's executors under his will, and that neither creditors nor legatees could claim it, but that the case must be looked upon as one of default of appointment and the money applied as directed by the rules, MACLENNAN, J. A., dissenting. Judgment of ROBERTSON, J., varied. *Johnston v. Catholic Mutual Benevolent Association*, 88.

*See* *Baker v. Forest City Lodge; Parkhouse v. Dominion Lodge*, 585 —INSURANCE.

### BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. *Alteration After Maturity—Discharge of Accommodation Maker—53 Vict. ch. 33, secs. 56, 58, 63 (D.)*—A promissory note made by two persons, one signing for the accommodation of the other, was, after maturity, signed by a third person:—

*Held*, on the evidence, that this third person signed as an additional maker and not as an endorser, and that there was, therefore, a material alteration of the note discharging the accommodation maker.

Judgment of BOYD, C., 28 O. R. 175, reversed. *Carrique v. Beatty*, 302.

2. *Demand Note—Alteration of Date—Limitation of Actions—Absence Beyond the Seas—Return from Beyond the Seas.*—The changing by the payee of the date of a demand note, payable with interest, to a later date, is a material alteration and makes it

void, though the effect of the alteration may be to benefit the maker by reducing the amount of interest chargeable against him.

Judgment of FALCONBRIDGE, J., affirmed.

The expression "beyond the seas" in 4 & 5 Anne ch. 3, sec. 19, is not to be construed literally, but means, when applied to a defendant sued in this Province, "out of the Province of Ontario."

To make the statute run in the defendant's favour, his return from beyond the seas must be open and of sufficiently long duration to have enabled the creditor, if he had known of it, to bring an action, though the creditor's knowledge is not essential. *Boulton v. Langmuir*, 618.

## BILLS OF SALE AND CHATTEL MORTGAGES.

*Chattel Mortgage—Affidavit of Bona Fides—Money not Actually Advanced.*]—The affidavit of *bona fides* attached to a chattel mortgage, duly executed and filed, stated that the mortgagor was justly and truly indebted to the mortgagee in a named sum. A loan was made in good faith upon the security of the chattel mortgage, but the money was not paid over for five days after the affidavit was made.

In an action by the assignee for the benefit of creditors of the mortgagor under a subsequent assignment, to set aside the mortgage:—

*Held*, reversing the judgment of MACMAHON, J., 27 O. R. 545, that the mortgage was valid. *Martin v. Sampson et al.*, 1.

See BANKRUPTCY AND INSOLVENCY, 2, 5.

## BREACH OF TRUST.

See BANKRUPTCY AND INSOLVENCY, 7.

## BROKER.

*Sale of Shares—Undisclosed Principal—Marginal Transfer—Principal and Agent—Indemnity.*]—A broker who buys bank shares for an undisclosed principal and does not accept the shares himself but, pursuant to a general power to transfer given by the vendor, transfers them to his principal, is not liable to indemnify the vendor against the statutory "double liability" which the principal fails to pay.

*In re Central Bank of Canada—Baines's Case*, 16 A. R. 237, referred to.

Judgment of a Divisional Court, 28 O. R. 285, reversed. *Boulbee v. Gzowski*, 502.

## CASES.

*Brabant v. Lalonde*, 26 O. R. 379, referred to.]—See WILL, 1.

*Bullock v. Downes*, 9 H. L. C. 1, referred to.]—See WILL, 1.

*Castor v. Uxbridge*, 39 U. C. R. 125, considered.]—See MUNICIPAL CORPORATIONS, 4.

*Cole v. Hubble*, 26 O. R. 279, considered.]—See SEDUCTION.

*In re Central Bank of Canada—Baines's Case*, 16 A. R. 237, referred to.]—See BROKER.

*In re Centre Wellington*, 44 U. C. R. 132, considered.]—See APPEAL.

*Re Colquhoun*, 26 O. R. 104, overruled.]—See DEVOLUTION OF ESTATES ACT.

*Cossette v. Dun*, 18 S. C. R. 222, considered.]—See DEFAMATION, 1.

*Delaney v. Canadian Pacific R. W. Co.*, 21 O. R. 11, overruled on question of arrears of interest.]—See MORTGAGE, 3.

*Doe d. Lowry v. Grant*, 7 U. C. R. 125, applied and considered.]—See WILL, 2.

*Re Ford, Patten v. Sparks*, 72 L. T. N. S. 5, referred to.]—See WILL, 1.

*Keachie v. Toronto*, 22 A. R. 371, followed.]—See RAILWAYS, 3.

*Kimball v. Smith*, 5 U. C. R. 32, considered.]—See SEDUCTION.

*L'Esperance v. Duchene*, 7 U. C. R. 146, considered.]—See SEDUCTION.

*Maxwell v. Clarke*, 4 A. R. 460, followed.]—See MUNICIPAL CORPORATIONS, 4.

*Re North Perth, Hessin v. Lloyd*, 21 O. R. 538, considered.]—See APPEAL.

*In re Prittie and Toronto*, 19 A. R. 503, considered.]—See ARBITRATION AND AWARD.

*Quick v. Church*, 23 O. R. 262, overruled.]—See HUSBAND AND WIFE, 4.

*Regina v. Daggett*, 1 O. R. 537, considered.]—See SUNDAY.

*Regina v. Tinning*, 11 U. C. R. 636, considered.]—See SUNDAY.

*Sornberger v. Canadian Pacific R. W. Co.*, 24 A. R. 263, approved and distinguished.]—See EVIDENCE, 2.

*Thompson v. Smith*, 23 A. R. 29, referred to.]—See WILL, 1.

*Warren v. Murray*, [1894] 2 Q. B. 648, applied.]—See LIMITATION OF ACTIONS.

*Westcott v. Powell*, 2 E. & A. 525, considered.]—See SEDUCTION.

*York v. Toronto*, 21 C. P. 95, considered.]—See MUNICIPAL CORPORATIONS, 5.

## CHATTEL MORTGAGE.

See BILLS OF SALE AND CHATTEL MORTGAGES.

## CHOSE IN ACTION.

1. *Parol Assignment*—*R. S. O. ch. 122, sec. 7.*]—A parol assignment of a chose in action is valid, notwithstanding section 7 of the Mercantile Amendment Act, R. S. O. ch. 122.

Judgment of FALCONBRIDGE, J., 27 O. R. 593, affirmed. *The Trusts Corporation of Ontario v. Rider*, 157.

2. *Assignment—Notice—Life Insurance.*]—A debtor, or trustee of a fund, is not responsible to an assignee of the creditor, or payee of the fund, for dealing with the latter persons without reference to the assignment unless it is found either that at the time of so dealing he actually knew of the assignee's title, or that he had previously received a notice sufficiently distinct to give

him an intelligent apprehension of the fact that the assignee had acquired an interest in the claim or fund.

A life insurance company issued two policies upon a man's life, one policy being payable generally and the other to his wife. The assured made an assignment for the benefit of his creditors, and the assignee, who at the time knew only of the policy payable generally, wrote to the company referring to this policy by number and informing them of the assignment. The assured's wife had died before the assignment was made and the policy in her favour had become part of the assured's estate and had passed to the assignee. A few weeks after notice of the assignment had been given to the company the assured informed them of his wife's death, and obtained from them the surrender value of the policy in which she was named as beneficiary. There was no imputation of bad faith, and the officers of the company swore that they had, at the time, no recollection of notice of the assignment for the benefit of creditors having been given :—

*Held*, that under the circumstances the company were not responsible for paying the surrender value of the policy to the husband.

Judgment of FERGUSON, J., reversed. *Crawford v. Canada Life Assurance Company*, 643.

### CHURCH.

*Trustees—Mortgage—Covenant—Personal Liability—R. S. O. ch. 237.*—The duly appointed trustees of a religious congregation, to whom by that description the site for a church has been conveyed, and who

by that description give to the vendor to secure part of the purchase money a mortgage with the ordinary covenant for payment, are a corporation and are not personally liable upon the mortgage although it is signed and sealed by them individually.

Judgment of FALCONBRIDGE, J., 28 O. R. 60, affirmed. *Beatty v. Gregory*, 325.

### COMMISSION.

See BANKRUPTCY AND INSOLVENCY, 3—EXECUTORS AND ADMINISTRATORS, 1—TRUST.

### COMPANY.

*Winding-up Act—Payment out of Court—Right of Receiver-General to Compel Repayment—Court Funds—Payment to Person not Entitled—Jurisdiction of Court to Compel Repayment—R. S. C. ch. 129, secs. 40, 41—55 & 56 Vict. ch. 28, sec. 2 (D.).*—Where the liquidators of an insolvent bank have passed their final accounts and have paid into Court the balance in their hands, and that balance is by inadvertence paid out of Court to a person not entitled to it, the Receiver-General has such an interest in the fund that he may, even before three years from the time of payment in have expired, apply to the Court for an order for repayment into Court of the fund.

The Court has also inherent jurisdiction to compel the repayment into Court of money improperly obtained out of Court.

Judgment of STREET, J., reversed. *In re Central Bank of Canada. Hogaboom's Case*, 470.

See BROKER—CHURCH.



**COMPENSATION.**

*See* BANKRUPTCY AND INSOLVENCY,  
3 — EXECUTORS AND ADMINISTRATORS,  
1—TRUST.

**COMPROMISE.**

*See* EXECUTORS AND ADMINISTRATORS,  
2.

**CONDITION PRECEDENT.**

*See* WILL, 1.

**CONTEMPT.**

*See* APPEAL.

**CONTRACT.**

*See* SALE OF LAND.

**CONTRACTOR.**

*See* NEGLIGENCE.

**CORPORATION.**

*See* COMPANY.

**COURT FUNDS.**

*See* COMPANY.

**COURT HOUSE.**

*See* MUNICIPAL CORPORATIONS, 5.

**COVENANT.***Indemnity—Release—Sale of Land.*

—A covenant by a purchaser with his vendor that he will pay the mortgage moneys and interest secured by a mortgage upon the land purchased, and will indemnify and save harmless the vender from all loss, costs, charges and damages sustained by him by reason of any default, is a covenant of indemnity merely; and if before default the purchaser obtains a release from the only person who could in any way damnify the vendor, he has satisfied his liability.

Judgment of ROSE, J., affirmed. *Smith v. Pears*, 82.

*See* CHURCH—HUSBAND AND WIFE,  
1.

**CROWN.**

*Administration — Will — Probate — R. S. O. ch. 59.*—Where a person possessed of real and personal estate dies leaving no known relatives within the Province, the Attorney-General on behalf of Her Majesty may maintain an action to set aside letters probate of that person's will, executed without mental capacity, and in that action may obtain an order for possession of the real estate; but a grant of administration should be obtained by a separate proceeding.

Such an action under the statute R. S. O. ch. 59 is not for the purpose of escheating but to protect the property for the benefit of those who may be entitled.

Judgment of ROBERTSON, J., affirmed. *Regina v. Bonnar*, 220.

**DAMAGES.**

*See* DITCHES AND WATERCOURSES ACT—EVIDENCE, 1, 2—HUSBAND AND WIFE, 4—MORTGAGE, 2—MUNICIPAL CORPORATIONS—RAILWAYS, 3.

**DEFAMATION.**

1. *Libel—Mercantile Agency—Privilege.*]—A mercantile agency is not liable in damages for false information as to a trader given in good faith to a subscriber making inquiries, the information having been obtained by the agency from a person apparently well qualified to give it, and there being nothing to make them in any way doubt its correctness.

*Cossette v. Dun*, 18 S. C. R. 222, considered.

Judgment of *BOYD, C.*, 28 O. R. 21, reversed. *Robinson v. Dun*, 287.

2. *Slander — Privilege.*] — The defendant while aiding, at his request, the owner of stolen material in his search for it, said, when what was supposed to be part of it was found in the possession of a workman employed by the defendant, that the plaintiff had stolen it:—

*Held*, that both on the ground that the defendant had an interest in the search, and on the ground that it was his duty to tell his workman the material did not belong to the person from whom he had received it, the statement was *prima facie* privileged.

Judgment of *MACMAHON, J.*, reversed. *Bourgard v. Barthelmes*, 431.

**DEFEASIBLE FEE.**

*See Van Tassell v. Frederick*, 131.

**DEPOSIT.**

*See* SALE OF LAND.

**DEVOLUTION OF ESTATES ACT.**

*Children of Deceased Brother or Sister—R. S. O. ch. 108, sec. 6.*]—Under section 6 of the Devolution of Estates Act, R. S. O. ch. 108, where brothers or sisters are entitled to share on an intestacy, the children of a deceased brother or sister of the intestate are entitled to share *per stirpes*.

*Re Colquhoun*, 26 O. R. 104, overruled.

Judgment of *FERGUSON, J.*, reversed. *Walker v. Allen*, 336.

**DITCHES AND WATERCOURSES ACT.**

*Municipal Corporations — Damages—R. S. O. ch. 220.*]—A township municipality, within the limits of which a ditch is constructed under the provisions of the Ditches and Watercourses Act, in accordance with the award of the township engineer, made in assumed compliance with the requisition of the ratepayers interested, is not liable for damages caused to a resident of the township by the construction of the ditch, even though the requisition be in fact defective.

Judgment of the Drainage Referee affirmed. *Seymour v. The Township of Maidstone*, 370.

**DIVISIONAL COURT.**

*See* *WAY*.

**DOWER.**

See EXECUTORS AND ADMINISTRATORS, 2.

**DRAINAGE.**

1. *Improvement of Old Drain—Drain Extending into Adjoining Municipality*—57 Vict. ch. 56, sec. 75 (O.).]—Under section 75 of 57 Vict. ch. 56 (O.), a township municipality which has constructed a drain within its own boundaries, connecting however with a drain constructed as an independent work by an adjoining municipality, has power, without the petition of the ratepayers, to provide for the necessary repairs to both drains, and to assess the adjoining municipality with its proportion of the cost.

Judgment of STREET, J., reversed. *In re Stonehouse and Plympton*, 416.

2. *Enlargement of Drain—Work Done Beyond Limits of Initiating Township—Error in Mode of Assessment—Assessment for Future Maintenance—Drainage Act, 1894*—57 Vict. ch. 56, sec. 75 (O.).]—Under section 75 of the Drainage Act, 1894, 57 Vict. ch. 56, sec. 75 (O.), any municipality whose duty it is to maintain any part of a drainage work constructed under the provisions of any Act respecting drainage by local assessment may, without being set in motion by any complainant, initiate proceedings for its repair and improvement and for extending its outlet, although nearly the whole of the cost is assessable against adjoining townships.

Where, however, the engineer of the initiating township assessed lands in the adjoining townships for im-

proved outlet upon the principle that all lands within the drainage area were liable, no matter how remote from the improved outlet, though such outlet was unnecessary for their drainage or cultivation, the original outlet being in fact sufficient, his report was set aside, BURTON, C.J.O., dissenting.

Per BURTON, C.J.O.—A question of this kind should be dealt with by the Court of Revision, and where the engineer acts in good faith his report cannot be set aside upon such a ground.

Per BURTON, C.J.O.—There is no power to assess for the estimated cost of future maintenance of a drainage work.

Judgment of the Drainage Referee reversed. *In re Township of Caradoc and Township of Ekfrid—In re Township of Metcalfe and Township of Ekfrid*, 576.

**EASEMENT.**

See WATER AND WATERCOURSE.

**EQUITABLE ASSIGNMENT.**

See PRINCIPAL AND AGENT.

**ESTATE.**

See *Van Tassell v. Frederick*, 131.

**ESTOPPEL.**

See HUSBAND AND WIFE, 1, 2.

**EVIDENCE.**

1. *Negligence—Bodily Injuries—Exhibition to Jury—Surgical Testimony—Inflammatory Address to Jury—Absence of Objection at Trial—Excessive Damages.*—The plaintiff in an action for bodily injuries may exhibit them to the jury for the purpose of having the nature and extent of the damage explained by a medical witness.

Review of American authorities on this subject.

The exhibition of injuries which have happened to another person, for the purpose of contradicting evidence given on behalf of the plaintiff in such an action, is not permissible unless competent evidence is forthcoming to explain their nature; but even with such evidence, *quære*.

Where complaint is made that counsel at the trial has improperly inflamed the minds of the jurors by remarks addressed to them, objection must be lodged at the time the remarks are made, and the intervention of the trial Judge claimed; and where this has not been done, the Court will not interfere upon appeal.

The injuries having been severe and caused much suffering, a verdict of \$6,500 was not one that should be disturbed as excessive.

Judgment of ARMOUR, C. J., affirmed. *Sornberger et al. v. Canadian Pacific R. W. Co.*, 263.

2. *Negligence—Damages—Exposure of Body to Jury—New Trial—Jury—Misconduct of Juror.*—In an action to recover damages for alleged malpractice the plaintiff is not entitled to shew to the jury the part of the body in question for the purpose of enabling them to judge as to its condition.

*Sornberger v. Canadian Pacific R. W. Co.*, 24 A. R. 263, approved and distinguished.

Decision of ARMOUR, C. J., reversed.

Attempting to dissuade a witness from giving evidence is such misconduct on the part of a juror as would justify the granting of a new trial. *Laughlin v. Harvey*, 438.

3. *Indecent Assault—Evidence of Reputation—Evidence of Specific Acts of Impropriety.*—In an action for damages for indecent assault evidence of the general reputation for unchastity of the plaintiff is admissible, but evidence of specific acts of impropriety is not.

Judgment of ROBERTSON, J., reversed. *Gross v. Brodrecht*, 687.

See SEDUCTION.

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**EXECUTORS AND ADMINISTRATORS.**

1. *Accounts—Commission.*—An executor who discharges his duty honestly but owing to want of business training keeps his accounts loosely and inaccurately is entitled to compensation for his care, pains and trouble, but the amount of compensation should not, in such a case, be relatively large.

Compensation when allowed should be credited to the executor at the end of each year.

Judgment of ROSE, J., reversed. *Hoover v. Wilson*, 424.

2. *Administrator with Will Annexed—Power to Compromise—Dower—R. S. O. ch. 110, sec. 31.*—An administrator with the will annexed has no authority as such to compromise dower or other claims

by assigning to the claimant a portion of the real estate of the deceased. *Irwin v. The Toronto General Trusts Co.*, 484.

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### EX PARTE MOTION.

*See* APPEAL.

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### EXONERATION.

*See* SETTLEMENT.

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### FALSA DEMONSTRATIO.

*See* WILL, 2.

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### FIRE

*Negligence—Clearing Land.*]—In the month of August, the defendant set out fire on his own land for the purpose of clearing it. This fire continued to burn till October, when, in consequence of a very high wind, sparks were carried to the plaintiff's land, and set fire to some ties and posts stored thereon:—

*Held*, that the question of the defendant's liability for negligence should be determined having regard to the circumstances existing in October, and not to those existing in August.

Judgment of STREET, J., reversed. *Beaton v. Springer*, 297.

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### FORFEITURE.

*See* SALE OF LAND.

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### FRAUDULENT CONVEYANCE.

*See* HUSBAND AND WIFE, 2.

### FRAUDULENT PREFERENCE.

*See* BANKRUPTCY AND INSOLVENCY.

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### GAOL.

*See* MUNICIPAL CORPORATIONS, 5.

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### GUARDIAN.

*See* PUBLIC SCHOOLS.

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### HIGHWAYS.

*See* MUNICIPAL CORPORATIONS, 1, 4—*NEGLIGENCE—RAILWAYS*, 3—*Noverre v. Toronto*, 109.

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### HUSBAND AND WIFE.

1. *Separate Property—Covenant—Mortgage—Estoppel.*]—Personal estate settled upon a married woman for her separate use for life without power of anticipation, and after her death to such uses as she might by deed or will appoint, and in default of appointment then over, no income therefrom having accrued due at the time of contracting, is not separate property in reference to which the married woman can be presumed to have contracted.

A married woman may shew in answer to an action against her upon a covenant in a mortgage made by her husband and herself containing no recital of her ownership, given to secure part of the purchase money of land purchased by the husband, but conveyed to her, that the conveyance was taken merely as trustee for her husband, and not for her benefit; and this although the mort

gatee or those claiming under him had no knowledge of her position.

Judgment of STREET, J., reversed.  
*Gordon v. Warren*, 44.

2. *Employment or Occupation in which Husband has no Proprietary Interest—Letting Lodgings—R. S. O. ch. 132, sec. 5—Fraudulent Conveyance—Attack under Claim of Third Person Acquired by Person Himself Estopped.*]—Where a married woman living in a house furnished by her husband, and supporting herself during his temporary absence in search of employment, lets lodgings and supplies necessaries to the lodger, she cannot recover from the lodger the money due as earned by her in an employment or occupation in which the husband has no proprietary interest.

Where a creditor takes the benefit of a conveyance alleged to be fraudulent, and on that ground fails in his action attacking it, the acquiring by him of a small claim and the bringing of another action upon it is an abuse of the process of the Court.

Judgment of the Divisional Court, 27 O. R. 423, reversed. *Young v. Ward*, 147.

3. *Sale of Wife's Property—Retention of Proceeds by Husband—Trustee—Lapse of Time—Parties—Separate Estate.*]—Where a house and land, the separate property of a married woman, were sold, and the proceeds taken and retained by her husband, who had never accounted for them :—

*Held*, in an action on a promissory note of the wife, twenty-six years after, that the husband remained a trustee for his wife of the proceeds, and the wife's claim constituted separate estate.

*Semble*, per MEREDITH, C.J., that

where, in such an action, the plaintiff claims that the married woman is entitled to separate estate under a certain will, the Court will determine the point without requiring the other beneficiaries under the will to be added as parties. *Briggs v. Willson*, 521.

4. *Alienation of Husband's Affections—Adultery of Husband—Damages—Married Women's Property Act—R. S. O. ch. 132.*]—Neither at Common Law, nor under the Married Women's Property Act, R. S. O. ch. 132, will an action lie by a married woman against another woman to recover damages for alienation of her husband's affections, and for committing adultery with him.

*Quick v. Church*, 23 O. R. 262, overruled.

Judgment of a Divisional Court reversed. *Lellis v. Lambert*, 653.

## ILLEGAL CONTRACT.

See INTOXICATING LIQUORS.

## IMPROVEMENTS UNDER MISTAKE OF TITLE

*Mortgage by Person making Them—Enforcement thereof against True Owner—Interest—Set-off of Rents and Profits—Occupation Rent—Assigns—R. S. O. ch. 100, sec. 30.*]—A purchaser of land made lasting improvements thereon under the belief that he had acquired the fee and then made a mortgage in favour of a person who took in good faith under the same mistake as to title. Subsequently it was decided that the purchaser had acquired only the title of a life tenant. The mortgagee was never in possession :—

*Held*, that the mortgagee was an "assign" of the person making the improvements within the meaning of section 30 of R. S. O. ch. 100, and had a lien to the extent of his mortgage which he was entitled to actively enforce:—

*Held*, also, that the value of the improvements should be ascertained as at the date of the death of the tenant for life, and that there should be as against the mortgagee a set-off of rents and profits or a charge of occupation rent only from that date till the date of the mortgage:—

*Held*, also, that interest should be allowed on the enhanced value from the date of the death of the tenant for life.

Judgment of STREET, J., affirmed. *McKibbin v. Williams*, 122.

### INDECENT ASSAULT.

See EVIDENCE, 3.

### INDEMNITY.

*Mortgage—Purchase Subject to Mortgage—Assignment of Right to Payment.*—The equitable obligation of a purchaser of land subject to a mortgage may be assigned by the vendor to the mortgagee, who may maintain an action thereon against the purchaser for recovery of the mortgage moneys.

Judgment of ROBERTSON, J., affirmed, BURTON, J. A., dissenting. *Campbell v. Morrison*, 224.

See BROKER—COVENANT—MORTGAGE, 2.

### INJUNCTION.

See APPEAL.

### INSURANCE.

*Life Insurance—Benevolent Society—"Member in Good Standing"—Domestic Forum.*—Where the rules of a benevolent society give to a member, dissatisfied with a decision as to sick benefits, a right of appeal to a domestic forum, the widow of a member, whose application for sick benefits has in his lifetime been refused, and who has acquiesced in that decision and has not appealed, cannot recover sick benefits.

Judgment of MEREDITH, J., reversed.

Where, however, the widow of "a member in good standing" is entitled to certain pecuniary benefits and the status of the member has not been passed upon by the society in his lifetime, an action by the widow will lie, and the status of the deceased member at the time of his death is a question of law to be determined in the usual way.

In the present case the fact that the deceased member was at the time of his death in arrear for dues was held, having regard to the constitution and rules of the society, not to deprive him of his status, and the widow was held entitled to recover.

Judgment of MEREDITH, J., affirmed. *Dale v. Weston Lodge*, 351.

See CHOSE IN ACTION.

### INTEREST.

See IMPROVEMENTS UNDER MISTAKE OF TITLE—MORTGAGE, 3.

**INTOXICATING LIQUORS.**

*Action for Price of Goods Sold—Illegal Object of Sale—Sale of Liquor to Unlicensed Dealer — Pleading Illegality.*]—In an action to recover the price of ale sold to the defendant by the plaintiffs, duly licensed brewers, it appeared that immediately after the order was booked, the plaintiffs were informed by her purchasing agent that the defendant had no license to sell, and it was then arranged that she should have the benefit of the plaintiffs' wholesale license and sell as their agent. The defendant pleaded that the ale was supplied to her for the purpose of its being sold by her in contravention of the Ontario Liquor License Act:—

*Held*, that the delivery of the ale having taken place with the knowledge of the purpose of the defendant, which was illegal, and having been made for the purpose of enabling her to carry that out, the plaintiffs could not recover.

Decision of *ARMOUR, C.J.*, at the trial reversed. *Bowie v. Gilmour*, 254.

**JOINT AND SEPARATE CREDITORS.**

*See* PARTNERSHIP.

**JURISDICTION.**

*See* APPEAL.

**JURY.**

*See* EVIDENCE, 1, 2.

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**LANDLORD AND TENANT.**

*Way—Mode of User.*]—The defendant leased to the plaintiff a small knoll or island, standing in a shallow lake, which in the dry season became a muddy marsh. The land surrounding the knoll or island belonged to the defendant and the lease provided that the plaintiff should have a right of way across it, nothing being said as to the mode of exercising the right. The plaintiff built a trestle bridge from the knoll or island to the main land and this bridge the defendant pulled down:—

*Held*, that the plaintiff's mode of user was reasonable and that the defendant was not justified in interfering with the bridge.

Judgment of *MEREDITH, J.*, reversed. *Butchart v. Doyle*, 615.

*See In re The Brantford Electric and Power Co. and Draper*, 301—MORTGAGE, 4.

**LEGACY.**

*See* SETTLEMENT—WILL, 3.

**LIBEL.**

*See* DEFAMATION.

**LIEN.**

*See* TRUST.

**LIFE INSURANCE.**

*See* INSURANCE.



**LIMITATION OF ACTIONS.**

*Vendor and Purchaser — Purchaser in Possession—Implied Trust —Tenant at Will—R. S. O. ch. 111, sec. 5, sub-secs. 7, 8.*—Sub-section 8 of section 5 of R. S. O. ch. 111, applies to the case of an implied trust, and a purchaser in possession with the assent of his vendor, and not in default, is, therefore, not to be deemed to be a tenant at will to his vendor within the meaning of sub-section 7 of that section.

*Warren v. Murray*, [1894] 2 Q. B. 648, applied.

Judgment of a Divisional Court, 28 O. R. 92, affirmed. *Irvine v. Macaulay*, 446.

See **BILLS OF EXCHANGE AND PROMISSORY NOTES**, 2—**MORTGAGE**, 3.

**LOCAL IMPROVEMENTS.**

See **MUNICIPAL CORPORATIONS**, 2.

**LORD'S DAY ACT.**

See **SUNDAY**.

**MARGINAL TRANSFER.**

See **BROKER**.

**MARRIED WOMEN'S PROPERTY ACT.**

See **HUSBAND AND WIFE**.

**MASTER AND SERVANT.**

*Contract for Defined Term — Continuance of Employment—Right to Dismiss.*—Where a book-keeper

is engaged for the term of one year, and his employment is continued after the expiration of that time there is no presumption that it is to continue for another year absolutely. The employer may dismiss him at any time upon reasonable notice, and where there is no evidence of usage to the contrary, three months' notice is reasonable.

Judgment of **MEREDITH, C.J.**, reversed. *Harnwell v. Parry Sound Lumber Company*, 110.

See *Bain v. Anderson*, 296 — **NEGLIGENCE**.

**MAXIMS.**

*Respondent Superior.*—See **NEGLIGENCE**.

**MERCANTILE AGENCY.**

See **DEFAMATION**, 1.

**MORTGAGE.**

1. *Power of Sale—Negligence—Sale of Two Lots in One Parcel.*—A mortgagee who, under a power of sale, without previous enquiry of any kind, put up for sale by auction, and sold in one parcel a farm, and two shops in a village nearly three-quarters of a mile away, not in any way used together, was held liable for the difference between the amount realized and the amount which would have been realized had the farm and shops been sold separately.

Judgment of the Divisional Court, 27 O. R. 548, affirmed, **BURTON, J. A.**, dissenting. *Aldrich v. Canada Permanent Loan and Savings Co.*, 193.

2. *Covenant of Indemnity by Purchaser of Equity—Assignment of same to Mortgagee—Subsequent Dealings of Mortgagee with such Purchaser—Release—Damages.*]—A mortgagor of land sold the equity and took from the purchaser a covenant to pay off the mortgage which he assigned to the mortgagee, who afterwards, without his knowledge, took by assignment from the purchaser the benefit of similar covenants from sub-purchasers, agreeing to exhaust her remedies against the latter before suing the purchaser:—

*Held*, that the mortgagee had not thereby lost her right of action on the mortgagor's covenant in the mortgage, and if the latter's rights against the purchaser of the equity from him had been impaired by the plaintiff's conduct, that would be matter for damages after enquiry. *Barber v. McCuaig*, 492.

3. *Interest—Redemption—R. S. O. ch. 111, sec. 17.*]—In an action of redemption by a second mortgagee against a first mortgagee the latter is entitled to only six years' arrears of interest.

*Delaney v. Canadian Pacific R. W. Co.*, 21 O. R. 11, overruled on this point.

Judgment of MEREDITH, C.J., reversed. *McMicking v. Gibbons*, 586.

4. *Leasehold—Acquisition of Reversion by Mortgagor.*]—Where the assignee of a term, subject to a mortgage of the term and of the rights of renewal and of purchase given by the lease, exercises the right of purchase, the mortgage becomes a charge upon the fee, and the purchaser has no lien upon the fee for the amount of the purchase money in priority to the mortgage.

Judgment of MEREDITH, C.J., 28 O. R. 316, affirmed. *Building and Loan Association v. McKenzie*, 599.

See CHURCH—HUSBAND AND WIFE, 1—IMPROVEMENTS UNDER MISTAKE OF TITLE—INDEMNITY—SETTLEMENT.

## MUNICIPAL CORPORATIONS.

1. *Negligence—Defect in Sidewalk beyond Line of Highway.*]—A city corporation is liable for injuries happening to a person while walking and resulting from the defective condition of a part of a sidewalk constructed by them, extending beyond the true line of the street over adjacent private property so as ostensibly to form a portion of the highway, such defect being caused through the owner of the property having placed on such part of the sidewalk a grating covering an area, and having allowed it, to the knowledge of the municipality, to fall into disrepair so close to the highway as to render travel unsafe. *Badams et ux. v. City of Toronto*, 8.

2. *Local Improvements—Increase of Cost.*]—The extension of a street was petitioned for as a local improvement by the requisite number of owners, and the petition was acceded to by the Council and a by-law passed for the purpose, the cost being estimated at \$14,500, an assessment for that sum being adopted by the Court of Revision after notice to the persons interested. After some delay the Council purchased the land required at a price much greater than the estimate and passed a by-law levying over \$36,000 for the work. No work was done on the ground and no notice of the second assessment was given:—

*Held*, that an opportunity of contesting the second assessment should have been given, and that the by-law was invalid.

Judgment of ROSE, J., affirmed. *Petman v. City of Toronto*, 53.

3. *Notice of Action—General Issue—Breach of Contract in not Supplying Pure Water—Inapplicability of Statutory Defences*—35 Vict. ch. 79, secs. 28, 35 (O.)—41 Vict. ch. 41, secs. 1, 3 (O.)—R. S. O. ch. 73, secs. 1, 13, 14, 15.]—Action against a municipal corporation for not providing a proper supply of pure water for the plaintiffs' elevator according to agreement, and for negligently and knowingly allowing the water supplied by them to become impregnated with sand, which greatly damaged the elevator:—

*Held*, that the action was one for breach of contract, and therefore the statutory defences and the defence of want of notice of action, etc., under statutes giving the same protection as that given to justices of the peace in the execution of their duties were inapplicable.

Decision of ROBERTSON, J., affirmed. *The Scottish, Ontario, and Manitoba Land Company v. The Corporation of the City of Toronto*, 208.

4. *Highways—Negligence—Nuisance*.]—A municipal corporation is not responsible for damages resulting from a horse taking fright at railway ties piled, without the authority of the corporation, on the untravelled portion of a highway, but the person piling the ties on the highway is responsible.

*Maxwell v. Clarke*, 4 A. R. 460, followed.

*Castor v. Uxbridge*, 39 U. C. R. 125, considered.

Judgment of MEREDITH, J., reversed in part. *O'Sail v. Windham*, 341.

5. *City Separated from County—Maintenance of Court House and Gaol—Care and Maintenance of Prisoners*—55 Vict. ch. 42, secs. 459, 473 (O.).]—No compensation can be awarded by arbitrators to a county municipality in respect of the use by a city separated from that county of the court house and gaol unless the question is specifically referred to them by a by-law of each municipality.

A claim for compensation for the care and maintenance of prisoners stands, as far as the meaning to be given to the word "city" is concerned, upon the same basis as a claim for compensation for the use of the court house and gaol.

The right to, and mode of arriving at the amount of, compensation for the use of the court house and gaol considered.

*York v. Toronto*, 21 C. P. 95, considered.

Judgment of ROSE, J., affirmed. *In re County of Carleton and City of Ottawa*, 409.

See *Noverre v. City of Toronto*, 109—*Ellis v. Town of Toronto Junction*, 192—DITCHES AND WATER-COURSES ACT—NEGLIGENCE—RAILWAYS, 2, 3—WAT.

## MUNICIPAL DEBENTURES.

See TRUST.

## NEGLIGENCE.

*Nuisance—Highway—Drain Tiles—Master and Servant—Contractor—Respondeat Superior*.]—A township council appointed by resolution

two of the defendants, who were members of the council, a committee to rebuild a culvert under a highway within the municipality. These two defendants employed another defendant as overseer of the work and two other defendants to draw drain tiles, which were required for the work, to the place in question. The work was done by the day and while it was being done the tiles in question, which were of a large size and of a light gray colour, were piled on the highway near the culvert. The plaintiffs' horse shied when passing the tiles and upset the vehicle, and the plaintiffs were injured :—

*Held, per* BURTON, J. A., OSLER, J. A., dissenting, that the act in which the defendants were engaged being in itself lawful they could be regarded only as servants of the council, and that the maxim *respondent superior* applied :—

*Held, per* MACLENNAN, J. A., OSLER, J. A., dissenting, that leaving the tiles at the side of the highway was not negligence and did not constitute a nuisance, and that no action lay.

In the result the judgment of BOYD, C., was reversed, OSLER, J. A., dissenting. *McDonald v. Dickenson*, 31.

*See Noverre v. Toronto*, 109—  
EVIDENCE, 1, 2—FIRE—MORTGAGE,  
1—MUNICIPAL CORPORATIONS, 1, 4  
—RAILWAYS.

### NOTICE.

*See* CHOSE IN ACTION, 2—PRINCIPAL AND AGENT.

### NOTICE OF ACTION.

*See* MUNICIPAL CORPORATIONS, 3.

### NUISANCE.

*See* MUNICIPAL CORPORATIONS, 4  
—NEGLIGENCE.

### OCCUPATION RENT.

*See* IMPROVEMENTS UNDER MISTAKE OF TITLE.

### PARLIAMENTARY ELECTIONS.

*See* APPEAL.

### PARTIES.

*See* BANKRUPTCY AND INSOLVENCY,  
2—HUSBAND AND WIFE, 3.

### PARTNERSHIP.

*Joint and Separate Creditors—Administration.*]—In the administration by the Court of the insolvent estate of a deceased partner the surviving partner is entitled to rank for a balance due to him in respect of partnership transactions and partnership debts paid by him, when, apart from his claim, there would be no surplus available for partnership creditors.

Judgment of a Divisional Court reversed, OSLER, J.A., dissenting. *In re Ruby. Trusts Corporation of Ontario v. Ruby*, 509.

### PATENT OF INVENTION.

*New Application of Old Mechanical Device.*]—The application to a new purpose of an old mechanical device is patentable when the new application lies so much out of the

track of the former use as not naturally to suggest itself to a person turning his mind to the subject, but requires thought and study.

The application to an oil pump of the principle of "rolling contact" was held patentable.

Judgment of FALCONBRIDGE, J., reversed. *Bicknell v. Peterson*, 427.

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### PAYMENT OUT OF COURT.

See COMPANY.

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### POLICE MAGISTRATE.

See *Ellis v. Toronto Junction*, 192.

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### POST OFFICE ACT.

See BANKRUPTCY AND INSOLVENCY, 7.

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### POWER OF SALE.

See MORTGAGE, 1.

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### PRACTICE.

See APPEAL—ARBITRATION AND AWARD—BANKRUPTCY AND INSOLVENCY, 2—COMPANY—WAY.

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### PRESSURE.

See BANKRUPTCY AND INSOLVENCY.

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### PRESUMPTION.

See SEDUCTION.

### PRINCIPAL AND AGENT.

*Attorney for Sale of Land—Direction to pay Advance out of Proceeds—Attorney Subsequently Purchasing—Personal Liability of Attorney—Equitable Assignment—Acknowledgment—Registry Act—Notice.*]—The attorney under an irrevocable power from the owner for the sale or other disposition of certain lands, and entitled in the event of sale to a share of the proceeds after payment of charges, agreed to pay out of the owner's share of the proceeds, when received, the amount of a further charge made by the owner, and subsequently purchased the lands himself:—

*Held*, that he was not personally liable to pay the amount of the charge.

Judgment of a Divisional Court, 27 O. R. 511, reversed, MACLENNAN, J. A., dissenting.

Execution of the document creating the further charge was proved by affidavit and attached to it but without any proof of execution were the agreement by the attorney to pay the charge and a transfer by the chargee to the plaintiff of the charge, and all the documents were accepted by the Registrar and registered:—

*Held*, affirming the judgment of a Divisional Court, 27 O. R. 511, that the defect in registration was cured by section 80 of the Registry Act, R. S. O. ch. 114, and that the attorney, who subsequently became the purchaser of the lands in question, was affected with notice of the plaintiff's rights. *Armstrong v. Lye*, 543.

See BROKER.

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### PRIVILEGE.

See DEFAMATION.

**PROBATE.**

See CROWN.

**PROMISSORY NOTES.**

See BILLS OF EXCHANGE AND PROMISSORY NOTES.

**PUBLIC SCHOOLS.**

*Guardian*—"Boarding-out Agreement"—54 Vict. ch. 55, sec. 40, sub-sec. 3 (O.).—The custodian of a child under a "boarding-out agreement" to clothe, maintain, and educate him, is not his "guardian" within the meaning of sub-sec. 3 of sec. 40 of the Public Schools Act of 1891, 54 Vict. ch. 55 (O.), and the trustees of the school section within which the custodian resides need not provide school accommodation for the child.

Judgment of FERGUSON, J., 28 O. R. 127, affirmed. *Hall v. Stisted School Trustees*, 476.

**RAILWAYS.**

1. *Negligence—Packing of Railway Frogs—Workmen's Compensation for Injuries Act*—55 Vict. ch. 30, sec. 5, sub-secs. 2 and 3 (O.).—*Statutes—Construction—Division into Sections*—51 Vict. ch. 29, sec. 262, sub-secs. 3 and 4 (D.).—Sub-section 3 of section 262 of the Railway Act, 51 Vict. ch. 29 (D.), provides that the spaces behind and in front of every railway frog shall be filled with packing. Sub-section 4 of the same section provides that the spaces between any wing rail and any railway frog, and between any guard rail and track rail, shall

be filled with packing, and this sub-section ends with a proviso that the Railway Committee may allow "such filling" to be left out during the winter months:—

*Held*, that this proviso applied to both sub-sections and that permission having been given by the Railway Committee to frogs being left unpacked during the period in question the defendants were not liable for an accident resulting from that cause.

The provisions of sub-sections 2 and 3 of section 5 of the Workmen's Compensation for Injuries Act, 55 Vict. ch. 30 (O.), as to packing railway frogs, are not binding upon railways under the legislative control of the Dominion.

Judgment of STREET, J., reversed. *Washington v. The Grand Trunk R. W. Co. of Canada*, 183.

2. *Municipal Corporations—Overhead Bridge—Approaches Thereto—Unlawful Incline—Accident—Liability to Repair—Railway Act of 1888*—51 Vict. ch. 29, sec. 186 (D.).—55 Vict. ch. 42, sec. 531 (O.).—A railway company, with the sanction of a township municipality, erected an overhead bridge across a highway, and afterwards, without the consent of the municipality, raised the same so as to cause the approaches thereto to be at a greater incline than prescribed by the Railway Act, 1888, 51 Vict. ch. 29 (D.). An accumulation of snow resulted from this, against which the plaintiff's cutter was upset, and she sustained injuries for which she brought this action:—

*Held*, that the accumulation of snow amounted to a want of repair under section 531 of the Municipal Act, 55 Vict. ch. 42 (O.), for which the municipality was liable:—

*Held*, also, that the railway company was also liable for a misfeasance in raising the bridge and approaches so as to be at a greater incline than prescribed by section 186 of the Railway Act, 1888, thus causing the obstruction by means of which the accident happened. *Fairbanks v. The Township of Yarmouth et al.*, 273.

3. *Municipal Corporations—Highways—Damages.*]—The plaintiff fell while attempting to cross a railway track which was lawfully, and without negligence or undue delay, being built across a street in a city :—

*Held*, that neither the railway company nor the city was responsible in damages.

*Keachie v. Toronto*, 22 A. R. 371, followed.

Judgment of FALCONBRIDGE, J., 28 O. R. 229, reversed. *Atkin v. City of Hamilton*, 389.

4. *Trespass—Invitation—Negligence—51 Vict. ch. 29, sec. 256 (D.).*]

—The defendants were in the habit of selling tickets to, and allowing passengers to get off at, a crossing or junction, the only means of egress to the highway being through the enclosed lands of the company. A passenger after disembarking from the train which had carried him to the crossing, and while walking along the track from the crossing to the highway, was killed by a passing train which had not given the statutory warning when nearing the highway :—

*Held*, that he could not, under the circumstances, be looked upon as a trespasser ; that the defendants were bound to use reasonable care towards him, and that, as there was some evidence of want of care, a

verdict in favour of his representatives could not be interfered with.

Judgment of a Divisional Court, 27 O. R. 441, affirmed.

*Per OSLER, J. A.* :—Section 256 of the Railway Act, 51 Vict. ch. 29 (D.), cannot be invoked for the benefit of persons using the track. *Anderson v. Grand Trunk R. W. Co.*, 672.

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## RECEIVER-GENERAL.

*See* COMPANY.

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## RECOUNT.

*See* APPEAL.

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## REDEMPTION.

*See* MORTGAGE, 3.

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## REGISTRY ACT.

*See* PRINCIPAL AND AGENT.

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## RELEASE.

*See* COVENANT.

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## RESCISSION.

*See* SALE OF LAND.

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## REVOCATION.

*See* BANKRUPTCY AND INSOLVENCY, 7.

**SALE OF GOODS.**

*See* **BROKER — INTOXICATING LIQUORS.**

**SALE OF LAND.**

*Contract — Rescission — Purchase Money — Promissory Note — Deposit — Forfeiture.*] — Where a contract for the sale of property is rescinded by the vendor for default of payment of the purchase money, he cannot afterwards recover from the purchaser the amount of a promissory note given by the latter before the default, in part payment.

*Semble*, moneys paid by the purchaser after rescission cannot be recovered back by him.

Judgment of *STREET, J.*, reversed. *Fraser v. Ryan*, 441.

*See* **COVENANT — PRINCIPAL AND AGENT — SETTLEMENT.**

**SECURITY.**

*See* *Halsted v. Bank of Hamilton*, 152 — **BANKRUPTCY AND INSOLVENCY**, 2.

**SEDUCTION.**

*Evidence — Presumption of Service — Loss of Service — R. S. O. ch. 58.*] — The plaintiff's unmarried daughter was seduced by the defendant while at service in his family. There was no pregnancy, and only very slight physical disturbance:—

*Held*, per *OSLER*, *MACLENNAN*, and *MOSS, J.J.A.*:—

1. That under the Seduction Act, R. S. O. ch. 58, an action lies by the parent although the daughter may not have been living with him

at the time of the seduction or subsequent illness.

2. That while mere illicit intercourse affords no ground of action, proof of illness or physical disturbance sufficient to have caused loss of service to the parent, if the girl had been living with the parent, is all that is necessary.

*Per OSLER and MOSS, J.J.A., MACLENNAN, J.A.*, dissenting, that the evidence fell short of that in this case.

*Per BURTON, C.J.O.*—That while there is under the Act, in an action by the parent, an irrebuttable presumption of service, there is no presumption of loss of service to the parent, which must still be proved, and that the action failed.

*Kimball v. Smith*, 5 U. C. R. 32; *L'Esperance v. Duchene*, 7 U. C. R. 146; *Westcott v. Powell*, 2 E. & A. 525; and *Cole v. Hubble*, 26 O. R. 279, considered.

In the result the judgment of *ROSE, J.*, 28 O. R. 140, was affirmed, *MACLENNAN, J.A.*, dissenting. *Harrison v. Prentice*, 677.

**SEPARATE ESTATE.**

*See* **HUSBAND AND WIFE.**

**SET-OFF.**

*See* **IMPROVEMENTS UNDER MISTAKE OF TITLE.**

**SETTLEMENT.**

*Mortgage — Exoneration — Will — Construction — Direction to Sell — Discretion as to Time — Legacy — Discretion as to Time of Payment.*]—



Certain land, subject with other lands to an overdue mortgage made by the settlor, was conveyed by him to trustees for his daughter by way of settlement to take effect on his death or her marriage. The conveyance to the trustees contained no covenants by the settlor and no reference to the mortgage, which remained unpaid at the time of the settlor's death:—

*Held*, that the mortgage should be paid out of the settlor's general estate.

A testator devised all his estate, real and personal, to trustees upon trust so soon after his death as might be expedient to convert into cash so much of his estate as might not then consist of money or first-class mortgage securities, and to invest the proceeds and apply the corpus and income in a specified manner. A later part of the will contained the following provision: "In the sale of my real estate or any portion thereof I also give my said trustees full discretionary power as to the mode, time, terms and conditions of sale, the amount of purchase money to be paid down, the security to be taken for the balance, and the rate of interest to be charged thereon, with full power to withdraw said property from sale and to offer the same for resale from time to time as they may deem best":—

*Held*, that the later clause merely gave a discretion as to the details and conditions of the sale, and did not qualify or override the specific direction to sell as soon after the testator's death as might be expedient.

The testator gave certain shares of his estate to two sons, the provision for payment being as follows:—"To each of my sons as they arrive at the age of twenty-three years or so soon

thereafter as my said trustees shall deem it prudent or advisable so to do, they shall pay over one moiety of his share of the corpus of said estate and the accumulated income on said moiety, if any, and the remaining moiety upon his attaining the age of twenty-seven years, or so soon thereafter as they shall deem it advisable so to do":—

*Held*, that this direction did not give the trustees an absolute discretion as to the time of payment, but that the general rule, that every person of full age to whom a legacy is given is entitled to payment the moment it becomes vested, applied.

Judgment of ARMOUR, C.J., affirmed. *Lewis v. Moore*, 393.

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## SHARES.

*See* BROKER.

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## STATUTES.

*See* BANKRUPTCY AND INSOLVENCY, 1—RAILWAYS, 1.

16 Vict. ch. 190, sec. 26.]—*See* WAY.

35 Vict. ch. 79, secs. 28, 35 (O.).]—*See* MUNICIPAL CORPORATIONS, 3.

41 Vict. ch. 41, secs. 1, 3 (O.).]—*See* MUNICIPAL CORPORATIONS, 3.

R. S. C. ch. 35, sec. 43.]—*See* BANKRUPTCY AND INSOLVENCY, 7.

R. S. C. ch. 129, secs. 40, 41.]—*See* COMPANY.

R. S. O. ch. 58.]—*See* SEDUCTION.

R. S. O. ch. 59.]—*See* CROWN.

R. S. O. ch. 72, secs. 5, 28.]—*See Ellis v. Toronto Junction*, 192.

R. S. O. ch. 73, secs. 1, 13, 14, 15.]—*See* MUNICIPAL CORPORATIONS, 3.

R. S. O. ch. 108, sec. 6.]—*See* DEVOLUTION OF ESTATES ACT.

R. S. O. ch. 100, sec. 30.]—*See* IMPROVEMENTS UNDER MISTAKE OF TITLE.

R. S. O. ch. 110, sec. 31.]—*See* EXECUTORS AND ADMINISTRATORS, 2.

R. S. O. ch. 110, sec. 38.]—*See* TRUSTEE.

R. S. O. ch. 111, sec. 5, sub-secs. 7, 8.]—*See* LIMITATION OF ACTIONS.

R. S. O. ch. 111, sec. 17.]—*See* MORTGAGE, 3.

R. S. O. ch. 114, sec. 80.]—*See* PRINCIPAL AND AGENT.

R. S. O. ch. 122, sec. 7.]—*See* CHOSE IN ACTION.

R. S. O. ch. 124, sec. 3, sub-sec. 3.]—*See* BANKRUPTCY AND INSOLVENCY, 2.

R. S. O. ch. 124, sec. 3, sub-sec. 6.]—*See* BANKRUPTCY AND INSOLVENCY, 3.

R. S. O. ch. 124, sec. 19, sub-sec. 4.]—*See* BANKRUPTCY AND INSOLVENCY, 2.

R. S. O. ch. 132.]—*See* HUSBAND AND WIFE, 4.

R. S. O. ch. 132, sec. 5.]—*See* HUSBAND AND WIFE, 2.

R. S. O. ch. 172.]—*See* BENEVOLENT SOCIETY.

R. S. O. ch. 203, sec. 1.]—*See* SUNDAY.

R. S. O. ch. 220.]—*See* DITCHES AND WATERCOURSES ACT.

R. S. O. ch. 237.]—*See* CHURCH.

51 Vict. ch. 29, sec. 186 (D.).]—*See* RAILWAYS, 2.

51 Vict. ch. 29, sec. 256 (D.).]—*See* RAILWAYS, 4.

51 Vict. ch. 29, sec. 262, sub-secs. 3 and 4 (D.).]—*See* RAILWAYS, 1.

52 Vict. ch. 13 (O.).]—*See* ARBITRATION AND AWARD.

53 Vict. ch. 31, secs. 74, 75 (D.).]—*See* *Halsted v. Bank of Hamilton*, 152.

53 Vict. ch. 33, secs. 56, 58, 63 (D.).]—*See* BILLS OF EXCHANGE AND PROMISSORY NOTES.

54 Vict. ch. 20 (O.).]—*See* BANKRUPTCY AND INSOLVENCY, 5.

54 Vict. ch. 55, sec. 40, sub-sec. 3 (O.).]—*See* PUBLIC SCHOOLS.

55 Vict. ch. 30, sec. 5, sub-secs. 2 and 3 (O.).]—*See* RAILWAYS, 1.

55 Vict. ch. 42, secs. 469, 473 (O.).]—*See* MUNICIPAL CORPORATIONS, 5.

55 Vict. ch. 42, sec. 531 (O.).]—*See* RAILWAYS, 2.

55 & 56 Vict. ch. 28, sec. 2 (D.).]—*See* COMPANY.

57 Vict. ch. 56, sec. 75 (O.).]—*See* DRAINAGE.

59 Vict. ch. 34 (O.).]—*See* BANKRUPTCY AND INSOLVENCY, 1.

## STREET RAILWAY.

*See* SUNDAY.

## SUBMISSION.

*See* ARBITRATION AND AWARD.

## SUNDAY

*Street Railway—Lord's Day Act—R. S. O. ch. 203, sec. 1—“Conveying Travellers.”*—A company incorporated for the purpose of operating street cars does not come within the Lord's Day Act, R. S. O. ch. 203, sec. 1.

*Per* BURTON, J. A.:—Taking persons in street cars from point to point in a city is not “conveying

travellers" within the meaning of the Act.

*Regina v. Tinning*, 11 U. C. R. 636, and *Regina v. Daggett*, 1 O. R. 537, considered.

Judgment of *Rose, J.*, 27 O. R. 49, affirmed. *Attorney-General v. Hamilton Street Railway Company*, 170.

### TENANT AT WILL.

See LIMITATION OF ACTIONS.

### TIME.

See ARBITRATION AND AWARD.

### TOLL ROAD.

See WAY.

### TRADE NAME.

*Geographical Designation*—"The Canadian Bookseller and Library Journal"—"*The Canada Bookseller and Stationer*."—The use of a geographical name in a secondary sense as part of the title identifying a mercantile journal and not as merely descriptive of the place where the journal is published will be protected.

The use of the name "The Canada Bookseller and Stationer" was restrained as conflicting with the name "The Canadian Bookseller and Library Journal."

Judgment of a Divisional Court, 27 O. R. 325, reversed, *MACLENNAN, J.A.*, dissenting. *Rose v. McLean Publishing Company*, 240.

### TRESPASS.

See RAILWAYS, 4.

### TRIAL.

See EVIDENCE, 1, 2.

### TRUST.

*Compensation—Lien—Municipal Debentures*—*R. S. O. ch. 110, sec 38.*—A person to whom municipal debentures in aid of a railway company are delivered in trust to be handed over to the company upon the completion of the railway is a trustee within section 38 of *R. S. O. ch. 110*, and entitled to compensation, and is also entitled to a lien on the debentures until that compensation is paid.

Judgment of *ROBERTSON, J.*, 28 O. R. 106 (*sub nom. In re Erma-tinger*) affirmed, but the amount of compensation reduced. *In re Tilsonburgh Lake Erie and Pacific Railway Company*, 378.

See CHOSE IN ACTION, 2—CHURCH—HUSBAND AND WIFE, 3—LIMITATION OF ACTIONS.

### VENDOR AND PURCHASER.

See LIMITATION OF ACTIONS.

### WATER AND WATERCOURSES.

*Surface Water—Easement—Lands of Different Levels.*—The doctrine of dominant and servient tenement does not apply between adjoining lands of different levels so as to give

the owner of the land of higher level the legal right as an incident of his estate to have surface water falling on his land discharged over the land of lower level although it would naturally find its way there. The owner of the land of lower level may fill up the low places on his land or build walls thereon although by so doing he keeps back the surface water to the injury of the owner of the land of higher level.

Judgment of a Divisional Court reversed. *Ostrom v. Sills*, 526.

### WATERWORKS.

See MUNICIPAL CORPORATIONS, 3.

### WAY.

*Toll Road—Municipal Corporation—Power to Sell Toll Road to Individual—Tolls—16 Vict. ch. 190, sec. 26—Practice—Appeal—Divisional Court.*—Under section 26 of 16 Vict. ch. 190, a municipal corporation to which, under 12 Vict. ch. 5, sec. 12, a toll road has been transferred by the Governor-in-Council, has power to sell the road to an individual, who may exact tolls for the use thereof. The right to purchase is not limited to toll road companies.

Judgment of a Divisional Court, 28 O. R. 157, reversed.

Where, pursuant to 12 Vict. ch. 5, sec. 12, the Governor-in-Council has transferred to a municipal corporation a toll road upon which certain rates of toll are in force, with the right to alter or vary the rates of toll, it can increase the rates of toll to any sum not exceeding the maximum mentioned in Schedule A. to 12 Vict. ch. 4, and a subsequent

transferee of the municipal corporation can exact payment of the increased rates and is not limited to a toll sufficient to keep the road in repair.

Where the Judge presiding at the trial of an action directs it to stand over to have parties added, and both parties apply to a Divisional Court to set aside this direction and, by consent and without prejudice to the right of appeal, ask the Divisional Court to hear the case on the merits, either party may, without leave, appeal to the Court of Appeal for Ontario from the judgment of the Divisional Court. *Payne v. Caughell*, 556.

See LANDLORD AND TENANT.

### WILL.

1. *Construction—“My Own Right Heirs”—Condition Precedent.*—A testator, who left him surviving his widow and one daughter, devised specifically described property to his daughter, and the residue of his estate to his executors upon trust for his widow and daughter in certain events with limited power to the daughter to dispose thereof by will. He then directed that “in case my daughter shall have died without leaving issue her surviving and without having made a will as aforesaid, my trustees shall (after the death of my wife if she survive my said daughter) sell all my estate, real and personal, and divide the same equally amongst my own right heirs, who may prove to the satisfaction of my said trustees their relationship within six months from the death of my said wife or daughter, whichever may last take place.”

The daughter died unmarried in

her mother's lifetime, having made a will assuming to dispose of the residue :—

*Held*, that the daughter was entitled to take as the "right heir" of the testator.

*Bullock v. Downes*, 9 H. L. C. 1 ; *Re Ford, Patten v. Sparks*, 72 L. T. N. S. 5 ; *Brabant v. Lalonde*, 26 O. R. 379 ; and *Thompson v. Smith*, 23 A. R. 29, referred to.

MACLENNAN, J.A., held also that upon the language of the will, apart from the clause above set out, the daughter took in fee, subject to the widow's rights, and that failure to make a will was a condition precedent to this clause taking effect.

Judgments of BOYD, C., in *Coatsworth v. Carson*, 24 O. R. 185, and *In re Ferguson, Bennett v. Coatsworth*, 25 O. R. 591, reversed upon grounds not argued before him. *In re Ferguson, Bennett v. Coatsworth*, 61.

2. *Construction — Falsa Demonstratio — Lot Described by Wrong Number.*—A testator who was the owner of the south-west quarter of lot twelve in the fourth concession and of lot twelve in the fifth concession of a township and of no other real estate, after providing for payment of his debts and funeral expenses by his executors, declared that "the residue of my estate which shall not be required for such purposes I give, devise and bequeath as follows," and then devised "the south-westerly quarter of lot eleven, concession four" and lot twelve in the fifth concession :—

*Held*, that the word "eleven" might be rejected as *falsa demonstratio* and the devise read as if it were "the residue of my real estate in the fourth concession."

*Doe d. Lowry v. Grant*, 7 U. C. R. 125, applied and considered.

Judgment of FALCONBRIDGE, J., affirmed. *Doyle v. Nagle*, 162.

3. *Legacy—Abatement.*—A testator by his will directed that a farm should be sold and that his executors should "first out of the said proceeds set apart the sum of \$2,000, and invest the same in some safe security for the benefit of and for the maintenance and education of" the testator's grandson, subject to certain provisions as to payment of the income and corpus, and he then further directed that "out of the proceeds of the sale of the land there shall be paid the following legacies" to three daughters and a son of the testator :—

*Held*, that the general rule of equality among legatees applied, and that, there not being sufficient to pay all the legacies in full, the grandson's legacy should abate proportionately.

Judgment of ARMOUR, C. J., reversed. *Lindsay v. Walbrook*, 604.

*See Van Tassell v. Frederick*, 131 —CROWN—SETTLEMENT.

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## WINDING-UP ACT.

*See* COMPANY.

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## WORDS.

"*Assigns.*"—*See* IMPROVEMENTS UNDER MISTAKE OF TITLE.

"*Beyond the Seas.*"—*See* BILLS OF EXCHANGE AND PROMISSORY NOTES, 2.

*"Buildings and Erections."*—See  
LANDLORD AND TENANT.

*"Conveying Travellers."*—See  
SUNDAY.

*"Die without Issue."*—See *Van*  
*Tassell v. Frederick*, 131.

*"Guardian."*—See PUBLIC  
SCHOOLS.

*"Member in Good Standing."*—  
See INSURANCE.

*"My Own Right Heirs."*—See  
WILL, 1.

*"Negotiation."*—See *Halsted v.*  
*Bank of Hamilton*, 152.

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**WORKMEN'S COMPENSATION  
FOR INJURIES ACT.**

See RAILWAYS, 1.

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